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Supreme Court of the United States

OCTOBER TERM, 1994

THE AMERICAN LIBRARY ASSOCIATION; FREEDOM TO READ FOUNDATION; AMERICAN BOOKSELLERS ASSOCIATION, INC.; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS, INC.; COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATION, INC.; INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC.; NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS; NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION; IVR MANAGEMENT CO., INC., d/b/a THE EXPRESSION VIDEO RETAILERS ASSOCIATION; PENTHOUSE INTERNATIONAL, LTD.; HANK LONDONER PHOTOGRAPHY, INC.; HAAREN ENTERPRISES, INC., d/b/a SUZE RANDALL PHOTOGRAPHY,

Petitioners,

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; DEPARTMENT OF JUSTICE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Child Protection Restoration and Penalties Enhancement Act of 1990, 18 U.S.C. Sec. 2257, which imposes its burdensome recordkeeping and disclosure requirements on speech of only specified content, and which concededly applies in the vast majority of its applications to speech that is fully protected by the First Amendment, can be deemed content-neutral and therefore reviewed under the intermediate level of First Amendment scrutiny?

2. Whether intermediate scrutiny is appropriate for the Act, which concededly burdens and effectively bans protected speech, simply because the law does not, by its terms, expressly ban such speech?

3. Whether intermediate scrutiny, assuming it is applicable, permits a court to uphold the Act based on assumptions of fact without any demonstration that the statute will in fact alleviate, in a direct and material way, the harms the government purports to avoid?

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PETITION FOR WRIT OF CERTIORARI

Petitioners American Library Association, et al.,[1] respectfully pray that a writ of certiorari issue to review

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[1] Petitioner Penthouse International, Ltd.'s parent is General Media Publishing Group, Inc., whose parent is General Media

the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above proceeding on September 20, 1994.

OPINIONS BELOW

The September 20, 1994 opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 33 F.3d 78, and is reprinted in the Appendix to this petition at 1a ("Pet. App."). The opinion of the United States District Court for the District of Columbia is reported at 794 F. Supp. 412, and is reprinted in the Appendix to this petition at 34a.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered its decision on September 20, 1994. By order dated February 28, 1995, the court denied petitioners' timely petition for rehearing. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue, codified at 18 U.S.C. § 2257, which are lengthy, are set out in the Appendix to this petition at 58a. The implementing regulations are reprinted in the Appendix at 63a.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The statute at issue—the Child Protection Restoration and Penalties Enhancement Act of 1990 (the "Act")—was introduced two days after its predecessor was struck down as violative of the First Amendment. *See Ameri-*

International, Inc. The other petitioners have no parent companies, and none of the petitioners has a subsidiary that is not wholly owned.

can Library Ass'n v. Thornburgh, 713 F. Supp. 469, 477 (D.D.C. 1989), *vacated as moot*, 956 F.2d 1178 (D.C. Cir. 1992) ("*ALA I*").[2] Like its predecessor, the Act imposes complicated and extensive recordkeeping and disclosure requirements on producers and commercial distributors of expressive materials containing images covered by the statute.[3] The Act requires every person who "produces" any matter containing at least one "visual depiction[] . . . of actual sexually explicit conduct" made after November 1, 1990, to create and maintain specified "individually identifiable" records. 18 U.S.C. § 2257(a).[4] The Act applies to visual images *regardless of the age of the performer*. Thus, it is uncontested that the Act applies to expression that is fully protected under the First Amendment.[5]

In order to create the requisite records, the "producer" must "ascertain, by examination of an identification doc-

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[2] The bill was enacted during the pendency of the government's appeal of the first district court decision. The United States Court of Appeals for the D.C. Circuit accordingly vacated that decision as moot. *ALA I*, 956 F.2d at 1186-87.

[3] Congress neglected to repeal provisions of the old statute. As a result, the current text of Section 2257 is confusing, to say the least.

[4] The Act applies only to images that "depict" "actual," as opposed to "simulated," conduct. 18 U.S.C. § 2257(h)(1). However, neither the Act nor the regulations give any guidance as to how that distinction should be made. Moreover, "secondary producers," who by definition were not involved in the original creation of the image, and distributors have no way of determining whether the conduct "depicted" is "simulated" or not. The Act thus forces those who create images of simulated conduct—which are *not* subject to the recordkeeping and disclosure requirements—nonetheless either to comply with the Act or to provide assurances to everyone else in the chain of supply and distribution that the image is not subject to the Act. The Act thus burdens an even broader range of expressive activity than its terms would suggest.

[5] Sexually explicit images of adults are fully protected by the First Amendment unless they violate each of the three prongs of *Miller v. California*, 413 U.S. 15, 24 (1973).

ument containing such information, the . . . name and date of birth" of each "performer" in the image.[6] 18 U.S.C. § 2257(b)(1). This requirement necessitates viewing and copying more than one ID if the performer's government-issued ID does not have a "recent and recognizable photo." *See id.* § 2257(h)(2); 28 C.F.R. §§ 75.1(b), 75.2(a)(1). Each producer must also "ascertain any name ever used by the performer including maiden name, alias, nickname, stage or professional name." 18 U.S.C. § 2257(b)(2).[7] Records of this information must be cross-indexed and retrievable by *every* name, and by the title or other identifier of *every* book, photo or other visual medium in which the performer appears. 28 C.F.R. § 75.3.

The Act defines the term "produces" to include duplication, reproduction, or reissuing of any covered material, but to exclude "mere distribution." 18 U.S.C. § 2257 (h)(3). The regulations require "primary" producers—those who actually film, video or photograph an image—to examine and copy *original* identification documents and ascertain all of the model's various names, such as nicknames, aliases, and stage names. 28 C.F.R. §§ 75.2 (a)(1) & (2), 75.1(c). So-called "secondary" producers (no matter how far removed from the original production) must either examine original documents or obtain copies of the requisite records from a prior producer. *Id.* §§ 75.1(c)(2), 75.2(b).

Under the Act, *all* producers must retain the records indefinitely at their place of business. 18 U.S.C. § 2257(c). The regulations specify, however, that a pro-

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[6] "Performer" is defined to include those "assisting" another in the performance of sexual conduct. *Id.* § 2257(h)(4).

[7] Under the regulations, the list of nicknames must be accurate as of the date the image was made. 28 C.F.R. § 75.2(c). The list thus must include every nickname by which the performer was ever called since his or her childhood. All of these names must be cross-indexed.

ducer must retain the records for as long as it is in business, and for five years more. 28 C.F.R. § 75.4. A producer that is an organization must appoint a custodian of records, who must retain the records for five years after his or her employer goes out of business and must personally bear the burden of the Act's requirements. *Id.* The producer must make the records available to the Attorney General. 18 U.S.C. § 2257(c).

The Act also imposes substantial *disclosure* requirements on *all* producers. Each producer must affix a label on every copy of any work containing at least one covered image—every magazine, video, slide, photo, or piece of film. 18 U.S.C. § 2257(e). The label must include the title or other identifier of the work; the producer's business address; the record custodian's name and title; and the date of "production." 28 C.F.R. § 75.6(a) & (b). Because "production" includes duplication, reproduction, or reissuance, a master video would have to be altered to change the label upon each and every duplication. The label must be accurate as of the date on which the material is "sold, distributed, redistributed, or released." *Id.* § 75.6(c). The label must be "prominently displayed" and the regulations specify the placement in magazines, books, films and videos. *Id.* § 75.8.

The Act expressly provides that no information or evidence obtained from the records may "directly or indirectly, be used as evidence against any person with respect to any violation of law." 18 U.S.C. § 2257(d)(1). The only exception to this prohibition is that the information or evidence may be used in any prosecution for violation of the Act or "for a violation of any applicable provision of law with respect to the furnishing of false information." *Id.* § 2257(d)(2). Notably, the records and evidence gleaned from them cannot be used to prosecute a child pornography offense.

The penalties for failure to abide by any aspect of the Act's recordkeeping and disclosure requirements are sub-

stantial. With respect to images covered by the Act—constitutionally protected images of adults—production unaccompanied by creation and maintenance of the required records, production without affixing the required label, and distribution without the required label, are all felonies, punishable by up to two years in prison and a fine for the first offense; and from two to five years in prison and a fine for each additional offense. *Id.* § 2257(i).

* * *

The Act and regulations literally ban and criminalize the sale and distribution of constitutionally protected speech. For example, the Act *bans* distribution of non-obscene images of adults if the producer has not attached the requsite disclosure label. No recordkeeping or disclosure requirements are imposed on distributors. Yet the Act prevents distributors from exercising *their* First Amendment rights if someone else does not fulfill his or her obligations under the Act.

The Act also *bans* domestic distribution of constitutionally protected foreign-made materials. U.S. distributors have a constitutional right to distribute such foreign-made materials in this country, and U.S. citizens have a constitutional right to read those materials. Under the Act, however, these materials will not legally be available in the United States if the foreign producer, who is *not* subject to the Act's requirements, did not voluntarily comply with the law.

And there is uncontroverted evidence that the Act will *ban*—effectively kill—a significant genre of art: appropriationist artwork that incorporates images of actual sexually explicit conduct created by others. These artists, "producers" under the Act, have no means of obtaining the requisite identification documents from the original creator of the image.

B. Summary of Proceedings

Petitioners all produce or distribute materials that are subject to the Act. Although petitioners are adamantly opposed to child pornography and take great care to ensure they do not violate child pornography laws, the Act's recordkeeping and disclosure requirements nevertheless unduly burden their First Amendment rights to produce and distribute constitutionally protected images of *adults.*

On cross-motions for summary judgment, petitioners submitted thirteen affidavits and declarations from individuals and organizations directly subject to the Act to demonstrate the concrete and substantial burdens imposed by the Act and regulations. The government submitted *no evidence whatsoever* to rebut that showing. Petitioners' affidavits demonstrate that the Act substantially burdens each link of the chain of production and distribution of constitutionally protected images; that the impact even on producers who have contact with the models is significant; and that the most burdensome and disabling consequences of the Act fall "downstream" on "secondary producers," who have no contact with the model, and on distributors.

Based on the uncontroverted evidence submitted by petitioners, the district court invalidated the Act as a violation of the First Amendment "as it applies to production and distribution of visual images of adults," Pet. App. 34a, because the Act was not narrowly tailored under any level of scrutiny.

The district court observed, as the government had conceded, that the Act burdens expression that is fully protected by the First Amendment. Indeed, the court noted uncontroverted evidence in the record demonstrating that artists use sexual images covered by the Act, combined with words, to express powerful and highly political messages. The Court recognized that such expression is entitled to "the highest degree of protection."

Pet. App. 42a n.5. The court noted the substantial burdens imposed by the Act, highlighting the fact that the Act "will operate to *ban* distribution of a wide range or foreign-produced, sexually explicit material" containing images of adults. Pet. App. 37a (emphasis added). The court also noted, as the unrebutted record makes clear, that the Act would "impose virtually insurmountable burdens" on many of the artist-plaintiffs subject to the Act. Pet. App. 38a & n.3 (focusing on the burdens imposed on "appropriationist" artists). The Act will also "invade the privacy of adult models and discourage them from engaging in protected expression," with concomitant limitation on creators' and distributors' ability to engage in constitutionally protected expressive activities. Pet. App. 46a.

Concluding that the statute is unconnected to its purported purpose, the district court found it unnecessary to determine the precise level of scrutiny appropriately applied to the Act. Pet. App. 42a-43a. The court acknowledged that the government's goal of fighting child pornography is "significant," but ruled that the Act is not narrowly tailored: "[T]he Act's primary flaw is that it applies to all depictions of actual sexually explicit conduct regardless of the age or even the apparent age of the model." Pet. App. 43a. Thus, even images of 30 or 40-year olds are covered. Indeed, the court concluded, "[t]he vast range of protected expression which falls under the Act's regulatory sweep alone requires it be found unconstitutional as applied to depictions of adults engaged in sexually explicit conduct." Pet. App. 44a.

The court further ruled that the Act "does not even bear a rational relationship to [the government's] goal." Pet. App. 43a. None of the records may be used in a child pornography prosecution, by the terms of the Act itself. If anything, this prohibition may make it *more* difficult to prosecute, because the government will have to show that it is not using such records. Pet. App. 44a.

In conclusion, the court held that the Act cannot be constitutionally applied to "[t]hose using adult models, represented by Plaintiffs in this case." Pet. App. 47a. "Accordingly, th[e] Court [indicated it would] enjoin enforcement of the Act as it applies to records that must be kept pertaining to images of adult models." *Id.* The court held that "[t]he Act, however, is constitutional as applied images of models under 18 years of age." *Id.* In an exercise of judicial discretion, the court narrowed the relief it awarded. It declared the Act unconstitutional "as applied to producers and distributors of any material who have satisfied themselves after due diligence that such material does not contain depictions of people under 18 years of age." Pet. App. 48a-49a.

On September 20, 1994, a panel of the D.C. Circuit issued an opinion affirming in part and reversing in part. The two judges in the majority (Buckley and Williams, J.J.) held that the Act is content-neutral, despite the fact that the Act applies *only* to speech of specified content. The court then determined that most of the Act's provisions imposed only an "incidental" restriction on speech and that the Act was sufficiently tailored to satisfy the intermediate level of scrutiny applied to content-neutral laws.

In a few narrow respects, the D.C. Circuit rewrote the Act to avoid clashes with the First Amendment. The court set aside the requirement that the records be kept indefinitely, for as long as the producer is in business and five years thereafter. Instead, "[p]ending its replacement by a provision more rationally tailored to actual law enforcement needs, [the D.C. Circuit] accept[ed] a period of five years as reasonable." Pet. App. 25a. The court also struck the requirement that the disclosure label be accurate "as of the date on which [the material] is sold, distributed, redistributed, or rereleased." 28 C.F.R. § 75.6(c). Instead, the D.C. Circuit held, "the information contained in the statement [must] be accurate as of the date that such materials are published, produced,

republished, or reproduced (in the sense of 'produced anew')." Pet. App. 27a. Finally, the court expanded the class of individuals excluded from the definition of "producer" to include not just photo processors, *see* 28 C.F.R. § 75.1(c)(4)(1), but also "persons who perform such services [as film development and processing, printmaking, or video duplicating] and return their work product to the producer who employed them." Pet. App. 29a.

The D.C. Circuit acknowledged that "appropriationists appear to fall within the definition of 'secondary producers.' [And] [i]f they do, the application of the Act to them would raise a serious First Amendment problem because of the difficulty they may encounter in securing the information that secondary producers are required to keep on file." Pet. App. 29a. Despite uncontroverted testimony as to this burden, and the government's effective acknowledgement that appropriationist artists would indeed constitute secondary producers, the court inexplicably concluded that "[i]t is a problem . . . that cannot be resolved on the present record." *Id.*

District Judge Reynolds, sitting by designation, dissented, stating that the Act "is overbroad, chilling, and a questionable deterrent to child pornography, and thus runs contrary to the First Amendment." Pet. App. 32a. While not convinced that the Act is content-neutral, Judge Reynolds concluded the Act must be stricken even under the "more relaxed standard applied to content-neutral regulation of expressive conduct." Pet. App. 33a. Judge Reynolds believed that the D.C. Circuit's opinion "permits an unwarranted intrusion into the First Amendment rights of citizens who are not child pornographers." Pet. App. 32a.

On November 4, 1994, petitioners timely filed a petition for rehearing and suggestion for rehearing *en banc*. On February 28, the court denied the petition and suggestion. Pet. App. 50a, 51a. District Judge Reynolds dis-

sented from the denial of the petition for rehearing. Judges Tatel and Wald dissented from the denial of the suggestion for rehearing *en banc*.

Writing in dissent, Judge Tatel, joined by Judge Wald, concluded that the full court should rehear the case because "[a]s applied to these petitioners, . . . the statute's burdens on speech may well be too great and its effects too tenuous for it to be constitutional." Pet. App. 53a. Judge Tatel expressed his disbelief that the statute is content-neutral, but concluded that, even if the Act is so deemed, "there is a serious risk that it 'burden[s] substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Judge Tatel articulated his "doubt that the statute can accomplish its purpose." Pet. App. 53a. He further noted that there are far less burdensome ways to deter use of minors in sexually oriented visuals. Moreover, he concluded, "whatever marginal deterrence the statute achieves may well be overshadowed by its unprecedented imposition of a permanent and pervasive regulatory burden on a single class of speakers." Pet. App. 53a.

Because the Act and regulations have been enjoined since before their effective date, they will not go into effect unless and until the D.C. Circuit's mandate issues. On March 13, 1995, the Court of Appeals granted petitioners' motion to stay issuance of the court's mandate. Pet. App. 57a.

REASONS FOR GRANTING THE WRIT

The Act *criminalizes* the production and distribution of "sexually explicit" speech unless the producer and distributor comply with burdensome recordkeeping and labeling requirements—even though it is conceded that the speech so criminalized *is fully protected by the First Amendment*. The D.C. Circuit upheld the constitutionality of the Act by a divided vote, finding (1) that the Act is content-neutral—even though it applies *only* to speech of specified content; (2) that the Act is subject to the intermediate level of scrutiny because it burdens but does not expressly ban protected speech; and (3) that the Act satisfies intermediate scrutiny—even though the statute, by its terms, cannot serve its articulated purpose and there is no evidence it can serve the government's newly asserted purpose.

Petitioners in this case—mainstream national media entities—are illustrative of the wide range of entities affected by the Act. The government has sought to portray the Act as applying only to a narrow group of producers on the fringe of constitutionally protected expressive activity. In reality, however, the Act impacts a vast number of visual materials: artwork appearing in celebrated galleries, magazines sold at corner newsstands, videos offered at neighborhood stores, films being shown at area movie houses, cable TV programs available to anyone with cable TV hookup, books available in public libraries, and computer bulletin boards that can reach every home. Particularly because it may be difficult for a secondary producer or distributor to determine whether a particular image is of "simulated" or "actual" conduct, the Act will affect an even broader range of constitutionally protected images than the statute's terms suggest. *See* note 4 *supra*. As Judge Tatel recognized, "a[]ll those who include sexually explicit material in their work will be affected, including some of society's most biting commentators on sex and sexuality." Pet. App. 54a.

The burdens imposed on First Amendment speakers by the Act and its implementing regulations are truly unprecedented. Contrary to the D.C. Circuit's view, no existing law imposes even remotely similar requirements. No law requires any entity to ascertain and collect every name (including childhood nicknames) ever used by the persons it employs; no law requires any entity to cross-reference identification files by every name ever used by the employee and every image in which the employee appears; no law requires employers to re-examine identification documents and re-ascertain every name if the employee appears in a subsequently produced image; no law requires these identification documents and name information to accompany a constitutionally protected image through every phase of production and to be retained and cross-referenced by every "producing" entity in the chain of production; no law requires creators, publishers, issuers, reissuers and duplicators of expressive materials each to label every individual copy of their visual images with disclosure requirements such as those imposed by the Act; and no law imposes the severe felony punishments created by the Act for violations of mere recordkeeping and labeling requirements.

As the record below demonstrates, the Act deters much speech of social value. As Judge Tatel put it, "[t]his statute imposes upon speakers a difficult dilemma: either comply at great cost of time, money and effort or risk the penalty of up to five years in prison." Pet. App. 55a. In fact, producers and distributors have a third, and more likely option—simply refrain from such speech in order to avoid the burdensome requirements of the Act. "In the end, the greatest effect of this statute, may thus well be to restrict not child pornography, but rather the flow of protected speech into the hands of galleries, stores, libraries, artists, and every adult who desires to see or hear it." *Id.* The Act bans from the world of ideas constitutionally protected images that do not have the requisite pedigree—*i.e.*, do not have the records and disclosure statement required by the Act.

In so doing, the Act "imposes a significant burden on the public's right to read . . . what [those subject to the Act] would otherwise have written." *United States v. National Treasury Employees Union*, —— U.S. ——, 115 S. Ct. 1003, 1015 (1995) ("*NTEU*") (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-757 (1976)).

Petitioners in this case joined together in a broad-based coalition to challenge the unprecedented assault on constitutionally protected speech the Act represents. The challenge to the Act and its predecessor has spanned seven years of litigation. No other entity is likely to attempt a similar challenge. Thus, the D.C. Circuit's decision is likely to be the last word on the constitutionality of this Act, unless this Court grants review.

This Court should grant the writ of certiorari because the D.C. Circuit's analysis of content-neutrality directly conflicts with the decisions of this Court and of other courts of appeals; because the D.C. Circuit fundamentally misunderstood the analysis distinguishing strict from intermediate scrutiny; and because the D.C. Circuit's analysis under intermediate scrutiny demonstrates serious doctrinal confusion regarding this Court's precedents. The decision establishes a dangerous precedent in a court in which First Amendment issues frequently arise. The magnitude of the D.C. Circuit's confusion and the breadth of the First Amendment rights abridged by the Act make this a case of exceptional importance.

I. THE D.C. CIRCUIT FUNDAMENTALLY ERRED IN HOLDING THAT THE ACT IS CONTENT-NEUTRAL AND SUBJECT TO INTERMEDIATE SCRUTINY, APPLYING TESTS THAT ARE INCONSISTENT WITH CONTROLLING PRECEDENT OF THIS COURT, AND THAT CONFLICT WITH THE TESTS APPLIED IN OTHER CIRCUITS.

The D.C. Circuit failed to follow the test required in *Turner Broadcasting Sys., Inc. v. FCC*, —— U.S. ——, 114 S.Ct. 2445 (1994), for determining whether

a law is content-based. The D.C. Circuit looked at the government's asserted purpose—to prevent the exploitation of children—and performed no further analysis to conclude that the Act was content-neutral. In so doing, the court ignored the fact that the Act, *on its face*, distinguishes on the basis of content by subjecting only "sexually explicit" speech to its requirements and prohibitions.

In *Turner*, the Court expressly held that looking *solely* at the governmental purpose is *not* sufficient when analyzing a law that, by its terms, makes content-based distinctions: "while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases . . . . Nor will the mere assertion of a content-neutral purpose be enough to save a law which, *on its face*, discriminates based on content." *Id.* at 2459 (emphasis added) (citations omitted).[8]

In *Turner*, the Court emphasized that the law at issue —a federal statute requiring cable operators to carry the signals of local broadcast stations—was not content-based because the obligation applied *regardless* of the content of the speech of either the broadcasters or the cable operator. *Id.* at 2460-61. The Court stressed that because cable operators could not, by altering the content of their speech, avoid application of the law, the law posed no danger of self-censorship, and thus was content-neutral. *See id.* at 2460. Here, in sharp contrast, the burdens of the Act apply only *because of* the content of the speech, and the Act creates strong incentives for

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[8] Indeed, this Court has routinely applied strict scrutiny and struck down laws which, by their terms, created content-based categories, although justified by undeniably content-neutral interests. *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (tax on paper and ink that applied only to certain newspapers); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (tax scheme that applied only to magazines of a specified content).

self-censorship because producers and distributors can avoid application of the Act by refraining from producing or distributing "sexually explicit" speech. That is precisely what many producers and distributors will do if the Act is upheld. Consequently, constitutionally protected speech will not be produced or distributed because of the burdens imposed by the Act. As the Court in *Turner* recognized, this is the hallmark of a content-based law for which strict scrutiny is appropriate. The D.C. Circuit ignored this teaching and its opinion is thus in direct conflict with *Turner*.

The fact that the D.C. Circuit did not attempt to distinguish *Turner*, but rather purported to *rely* upon the decision in concluding that the Act is content-neutral, Pet. App. 9a-10a, illustrates the confusion in the lower courts regarding the proper test for determining whether a law is content-based or content-neutral.

Underpinning its error, and further reflecting this confusion, is the D.C. Circuit's erroneous belief that a law is content-neutral if it regulates a large category of speech in order to target a very small subset of the speech. *See* Pet. App. 16a ("Producers of sexually explicit materials engage in conduct that potentially contains both protected . . . and unprotected . . . speech, and the Act permissibly targets that latter."). This Court expressly rejected that logic as a basis for a finding of content-neutrality in *Sable Communications v. FCC*, 492 U.S. 115 (1989), holding that a law applying to both protected and unprotected speech, with the purpose of suppressing only the unprotected subset, was content-based and subject to strict scrutiny. The Act is precisely that kind of law.

More broadly, the D.C. Circuit erred, and reflected further confusion regarding the test for determining whether strict scrutiny or intermediate scrutiny is required, in its effort to "reinforce[]" its holding by looking

to a variety of factors. The court's analysis was uniformly wrong:

• First, the D.C. Circuit noted that the Act "does not ban any kind of sexually explicit materials." Pet. App. 14a. Whether a law bans or simply burdens speech is *irrelevant* to the appropriate standard of review. This Court has repeatedly rejected distinctions between a burden and a ban on First Amendment rights. Thus, the Court has frequently applied strict scrutiny to disclosure and record-keeping requirements less onerous than those at issue in this case, that burden—but do not expressly ban—speech. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795 (1988); *Talley v. California*, 362 U.S. 60 (1960). *See also Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.").

In this regard, the D.C. Circuit's opinion is in direct conflict with several other Circuits that have held that mere regulation of sexually explicit speech—as distinguished from a total ban—triggers strict scrutiny. *See, e.g., Dial Information Servs. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992); *Fabulous Assocs., Inc. v. Pennsylvania Public Util. Comm'n*, 896 F.2d 780 (3d Cir. 1990); *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991).

Furthermore, the D.C. Circuit is wrong in claiming that the Act does not "ban" speech. Sexually explicit images of adults are protected under the First Amendment. Yet the Act *criminalizes* production and distribution of such images when they do not contain the requisite disclosures or the producer has not maintained the proper records. That is effectively a ban—it is a felony

to produce or distribute materials that do not comply with the Act's requirements.[9]

• Second, the D.C. Circuit relied upon the Court's decisions in *Turner* and *Leathers v. Medlock*, 499 U.S. 439 (1991), which held that regulations that establish categories on the basis of the medium by which speakers transmit messages—and not on the basis of the content of those messages—are not necessarily content-based. *See* Pet. App. 15a. The Act, however, clearly does *not* distinguish based on different physical means of transmitting images, and *does* distinguish based on the content of the images. *Turner* and *Leathers* thus provide no support for the D.C. Circuit's holding. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230-31 (1987) (holding that a law taxing magazines on the basis of content was subject to strict scrutiny); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (holding that a law regulating films depicting nudity was subject to strict scrutiny).

• Third, the D.C. Circuit misunderstood and improperly expanded this Court's ruling in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), into an exception that swallows the First Amendment. In *Renton*, the Court found content-neutral a local zoning ordinance that targeted the "secondary effects" of adult theaters—such as crime and urban decay—by restricting the location of such theaters. Crucial to the Court's ruling was the finding that the "secondary effects" were directly caused by the *entities* regulated, not by the content of the speech. The *Renton* Court stressed that the government's goal

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[9] As petitioners' undisputed affidavits make clear, in *many* cases it will be *impossible* for producers or distributors to comply with the Act's requirements. In those cases, the Act indisputably bans production or distribution of the speech at issue. And, as those affidavits also make clear, even in cases where compliance with the Act would be technically possible, it will often be so financially burdensome and administratively difficult as to be, in practical effect, a ban.

of eliminating crime and urban decay had no relation to any desire to suppress the *content* of movies shown by the theaters. *See Simon & Schuster*, 502 U.S. at 120 n.**. Here, by contrast, the government's purpose is to suppress the *content* of a subset of the images regulated by the Act—*i.e.*, those constituting child pornography.

The logic expressed by the D.C. Circuit is extremely dangerous to the values protected by the First Amendment and would have severe implications even beyond the context of "sexually explicit" speech. By focusing on legislative purpose to the exclusion of both the terms of the law itself and its actual effect, the court's holding authorizes the government to discriminate expressly on the basis of the content of speech so long as it can assert a seemingly content-neutral purpose. The court's analysis would allow the government to regulate, to the point of banning, any disfavored speech by imposing burdensome administrative requirements with which a speaker must comply before speaking. The First Amendment requires that such speech-specific laws be subjected to strict scrutiny, and the Court should not permit the D.C. Circuit's contrary opinion to stand.[10]

The D.C. Circuit's misguided analysis demonstrates a continuing and fundamental misunderstanding of the proper test for ascertaining content-neutrality. More broadly, the court's opinion reflects serious doctrinal confusion regarding the appropriate test for deciding whether to apply strict scrutiny or intermediate scrutiny. This Court should grant review to give needed guidance to the D.C. Circuit and other courts on these critical First Amendment issues.

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[10] Whether the Act could survive strict scrutiny could be decided by this Court, or by the Circuit Court on remand. We note, however, that the government made no serious attempt below to argue that the Act can survive strict scrutiny.

II. THE D.C. CIRCUIT EMPLOYED FUNDAMENTALLY IMPROPER INTERMEDIATE SCRUTINY ANALYSIS IN NOT REQUIRING THE GOVERNMENT TO DEMONSTRATE THAT THE ACT WILL IN FACT ALLEVIATE THE HARMS THE GOVERNMENT PURPORTS TO ADDRESS, IN A DIRECT AND MATERIAL WAY.

The D.C. Circuit's decision would be fundamentally wrong even if the Act were content-neutral and warranted only intermediate scrutiny. The D.C. Circuit patently misunderstood the correct inquiry under intermediate scrutiny, failing to assess whether the Act "will in fact alleviate the[] harms [sought to be avoided] in a direct and material way." *NTEU*, 115 S. Ct. at 1017. As the district court and the three dissenting court of appeals judges concluded: the D.C. Circuit's opinion is divorced from the record; and the Act, even accepting the court's faulty assumptions, is grossly overinclusive.

To survive intermediate scrutiny, a law must impose a "restriction on alleged First Amendment freedoms [that] is no greater than is essential to the furtherance of [the government's substantial] interest." *Turner*, 114 S. Ct. at 2450 (citations omitted). The D.C. Circuit misunderstood this standard, ignoring the government interest Congress sought to further. According to its principal sponsor, the Act is meant to "provide[] a necessary tool for prosecutors to prove that child pornographers intended to sexually exploit young children." 135 Cong. Rec. S13907 (Statement of Sen. DeConcini) (Oct. 24, 1989). But the elaborate records required by the Act will not help prosecutors prove knowledge of minority in child pornography cases because, by its terms, the Act *forbids* the use of such records "directly or indirectly" in any prosecution for child pornography. 18 U.S.C. § 2257 (d)(1). As two district courts have concluded, the Act provides no help to prosecutors and thus cannot serve the interest that Congress intended to further. *See* 713 F. Supp. at 478-79; Pet. App. 44a. *See also* Pet. App. 53a-54a (Tatel, J., dissenting).

The D.C. Circuit apparently recognized that that Act will do nothing to deter purposeful child pornography.[11] Rather, the court "discovered" an additional purpose never articulated, or even discussed, by Congress—to close a purported "gap" in existing law "by ensuring that honest but careless producers secure documentary evidence of a performer's age and by denying unscrupulous producers the defense that they reasonably believed the performer to be of age." Pet. App. 21a. This "explanation" is entirely unsupported by the record and is without foundation or logic. The Act will not deter the "careless" or "unscrupulous" producer because *ignorance of a performer's minority is not a defense* to a charge of producing child pornography. *See United States v. U.S. District Court*, 858 F.2d 534, 538 (9th Cir. 1988). Only a producer who "diligently investigated" a model's age, by reviewing documents, *inter alia*, can assert such a defense. *Id.* at 540. Thus, the Act does nothing to forward this purported purpose, first discovered by the Circuit Court.

The D.C. Circuit utilized improper reasoning in erroneously assuming that the Act furthers the government's new-found purpose. The unsupported factual assumptions of the government's argument—which find no basis in the record before Congress—cannot save the Act. In *Sable*, the Court held that courts may not credit "assertions" of fact made in support of laws that affect the First Amendment when there are "no legislative findings" and "no evidence in the record" to support such assertions. 492 U.S. at 128-29. As in *Sable*, the "Congressional

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[11] As both this Court and the Attorney General's Commission on Pornography have recognized, the industry of child pornography is distinct from the mainstream production and distribution of adult sexually explicit materials and exists primarily "underground." 1 Att'y Gen. Comm'n Final Report 405-10 (1986); *Osborne v. Ohio*, 495 U.S. 103, 110 (1990). As the D.C. Circuit noted in *ALA I*, those who consciously violate the child pornography laws and risk 10 years imprisonment are not likely to be concerned about the penalties imposed by the Act. 956 F.2d at 1191.

record presented . . . contains no evidence as to *how*" the Act might deter child pornography in the way the government asserts; nor did the government attempt to develop such a record. *Id.* at 130 (emphasis in original). There is neither evidence of the sort of "gap" the D.C. Circuit proclaims, nor evidence that the Act will help to fill it. *See* Pet. App. 53a-54a (Tatel, J., dissenting) (noting that the record "is devoid of any evidence indicating how extensive these effects will be").

In *NTEU*, decided after the decision at issue here, this Court held that the government must demonstrate that a statute, challenged on First Amendment grounds, *would actually serve* the asserted governmental interests in a practical way. 115 S.Ct. at 1015-1016. Quoting the *Turner* Court, the *NTEU* Court stressed that "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured,' . . . *It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.*'" *Id.* at 1017 (quoting *Turner*, 114 S. Ct. at 2450) (emphasis added). Instead of requiring such proof, the D.C. Circuit upheld the statute based on entirely speculative factual assumptions. This analysis is inconsistent with *Sable*, *Turner* and *NTEU*.

In any event, even if the Circuit Court's factual asumptions were supported by the record, they could not justify the Act's blunderbuss approach. A statute is not sufficiently tailored, under even intermediate scrutiny, where, as here, "a substantial portion of the burden on speech does not serve to advance [the government's] goals." *Ward v. Rock Against Racism*, 491 U.S. 791, 799 (1989). The vast majority (if not all) of those subject to the Act are neither "careless producers" nor "unscrupulous producers" who would use minors but for the Act.

The Act imposes its needless and burdensome requirements on mainstream producers and distributors of constitutionally protected images of *adults*. These producers and distributors, such as petitioners, take appropriate steps to determine the age of their models, as the record demonstrates, and do not deal in sexually explicit images of minors. The Act's application to these entities serves no purpose except to burden their speech by requiring them to create and maintain redundant sets of records and to label every visual image—in order to produce and distribute speech that is concededly fully protected by the First Amendment.[12]

To the extent there is a group of "careless" or "unscrupulous" producers, there are far more precise and narrower means of targeting them. As Judge Tatel noted, "[t]he only class of producers whose behavior this statute is likely to influence—those who ignore the age of their models but would nonetheless refuse to employ individuals they knew were minors—could be equally deterred, *with no corresponding regulatory burden on protected speech*, by rewriting the child pornography statutes to impose criminal liability upon those who recklessly or negligently

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[12] In *United States v. X-Citement Video*, 115 S. Ct. 464, 472 (1994), also issued after the panel's ruling, the Court indicated that criminalizing the distribution even of *child* pornography "would raise serious constitutional doubts," absent a requirement that the distributor know of the performer's age. In its analysis, the Court emphasized that because "non-obscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment . . . . one would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults. Therefore, the age of the performers is the *crucial element* separating legal innocence from wrongful conduct." *Id.* at 469 (emphasis added). The Act completely ignores that "crucial element" and imposes its complex set of recordkeeping and disclosure requirements on production and distribution of constitutionally protected images *of adults*. This constitutionally protected activity will constitute a felony without compliance with the senseless recordkeeping and disclosure requirements.

violate them." Pet. App. 54a (emphasis added). Like the law at issue in *Sable*, the Act "is another case of burning the house to roast the pig." *Sable*, 492 U.S. at 131 (internal quotations omitted). Even under intermediate scrutiny, such a law cannot stand.

* * *

In its desire to avoid striking down the Act as unconstitutional, the D.C. Circuit committed gross errors of law. The decision reflects fundamental misunderstandings regarding the proper inquiry for content-neutrality and the appropriate level of scrutiny, as well as the proper analysis under intermediate scrutiny. The legal precedent set by the court's decision is inconsistent with this Court's directives and, if left standing, will thoroughly disrupt and confuse First Amendment jurisprudence.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 9, 1993 Decided September 20, 1994

No. 92-5271

AMERICAN LIBRARY ASSOCIATION, *et al.*,
Appellees

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; DEPARTMENT OF JUSTICE,
Appellants

Appeal from the United States District Court for the District of Columbia

(D.D.C. No. 91cv00394)

Before BUCKLEY and WILLIAMS, *Circuit Judges*, and JOHN W. REYNOLDS,* *District Judge* for the Eastern District of Wisconsin.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

Dissenting opinion filed by *District Judge* REYNOLDS.

BUCKLEY, *Circuit Judge*: The district court has sustained appellees' ** First Amendment challenge to the

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

** American Library Ass'n, Freedom to Read Foundation, American Booksellers Ass'n, Inc., American Booksellers Foundation for

Child Protection and Obscenity Enforcement Act of 1988, as amended, and its implementing regulations. These require producers of materials depicting sexually explicit acts to maintain certain records documenting the names and ages of the persons portrayed and to attach statements to the materials indicating where the records are located. Because we find the challenged provisions to be content neutral and because, in most applications, they meet the intermediate level of scrutiny established by the Supreme Court in such cases, we affirm in part and reverse in part.

I. BACKGROUND

A. Legal Framework

1. *The statute*

The Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4485-4503 (1988) ("1988 Act" or "Act"), as amended by the Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4816-17 (1990) ("1990 amendments"), imposes record-keeping and disclosure requirements on the producers of certain sexually explicit materials. This legislation represents the most recent of a series of laws, beginning with the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) ("1977 Act"), that are designed to combat the sexual exploitation of children. Among the offenses made criminal by the 1977 Act, as amended, are the production and knowing distribution of materials visually depicting

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Free Expression, The American Society of Magazine Photographers, Council for Periodical Distributors Ass'ns, Inc., International Periodical Distributors Ass'n, Inc., National Ass'n of Artists' Organizations, National Campaign for Freedom of Expression, IVR Management Co., Inc., d/b/a The Independent Video Retailers Ass'n, Penthouse Int'l, Ltd., Hank Londoner Photography, Inc., Haaren Enterprises, Inc., d/b/a Suze Randall Photography.

minors engaged in sexually explicit conduct. 18 U.S.C. §§ 2251(a), 2252(a)(2) (1988 & Supp. II 1990).

The 1988 Act was passed by Congress on the recommendation of the Attorney General's Commission on Pornography in order to address a problem that had hindered the prosecution of child pornography offenses. *See American Library Ass'n v. Barr*, 956 F.2d 1178, 1182 (D.C. Cir. 1992) ("*ALA I*"). In particular, the Commission found that because producers tended to use performers who could pass for minors, distributors were able to avoid prosecution on a claim of ignorance of a child performer's true age while producers could assert that they had been deceived. *Id.* In order to address this problem, the 1988 Act required producers (as defined) of materials containing visual depictions of explicit sexual activity to determine the names and ages of the performers, maintain records of this information, and indicate on each copy of the material where those records are kept. 18 U.S.C. § 2257 (1988 & Supp. II 1990). Soon thereafter, several parties challenged the constitutionality of these provisions. The district court ruled, *inter alia*, that significant parts of section 2257 violated the First Amendment. *American Library Ass'n v. Thornburgh*, 713 F. Supp. 469, 479 (D.D.C. 1989). Following the filing of an appeal, Congress responded by adopting the 1990 amendments, which "significantly altered" the "scope and burden" of the section's original recordkeeping requirements. *ALA I*, 956 F.2d at 1186. Accordingly, we "vacate[d] the portion of the [district] court's judgment concerning the 1988 Act's recordkeeping provisions" as moot. *Id.* at 1187.

The Act provides that

> [w]hoever produces any book, magazine, periodical, film, videotape, or other matter which contains one or more visual depictions made after November 1, 1990 of actual sexually explicit conduct . . . shall create and maintain individually identifiable records

> pertaining to every performer portrayed in such a visual depiction.

18 U.S.C. § 2257(a). It defines "actual sexually explicit conduct" as "actual but not simulated conduct" involving (by reference to subsections 2256(2)(A)-(D)) sexual intercourse, bestiality, masturbation, and sadistic or masochistic abuse. *Id.* § 2257(h)(1) (Supp. II 1990). Producers of materials covered by the Act must, for every performer,

> (1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;
>
> (2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and
>
> (3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

Id. § 2257(b). Such records generally must be kept at the producer's place of business. *Id.* § 2257(c). Moreover, "a statement describing where the records . . . may be located" must be affixed to the materials covered by the Act ("disclosure requirement"). *Id.* § 2257(e)(1). If the producer is an "organization," this statement must include "the name, title, and business address of the individual employed by such organization responsible for maintaining the records. . . ." *Id.* § 2257(e)(2).

2. *The regulations*

The Attorney General issued regulations implementing this statutory framework on April 24, 1992. *See* 57 Fed. Reg. 15017, 15021 (1992) ("Final Rule"). These divide

producers into two categories, "primary" and "secondary." 28 C.F.R. § 75.1(c) (1993). A primary producer is one who "actually films, videotapes, or photographs a visual depiction of actual sexually explicit conduct," *id.* § 75.1(c)(1), while a secondary producer "produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues" materials containing such depictions that are "intended for commercial distribution." *Id.* § 75.1(c)(2). The same person, of course, may be both a primary and a secondary producer. *Id.* § 75.1(c)(3).

The regulations require that all producers maintain records that contain "[t]he legal name and date of birth of each performer, obtained by the producer's examination of an identification document. . . ." *Id.* § 75.2(a)(1). Those records must include a "legible copy of the identification document examined," *id.*, as well as "[a]ny name, other than each performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name." *Id.* § 75.2(a)(2). Moreover, these records must be so organized as to permit the retrieval of information based on the legal and alternative names of the performers and "according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, or other matter." *Id.* § 75.3. A secondary producer, however, is permitted to "maintain records by accepting from the primary producer . . . copies of the records" as long as he keeps the "name and address of the primary producer." *Id.* § 75.2(b). Both classes of producers must make these records available "for inspection at all reasonable times," *id.* § 75.5, at their places of business for "as long as the producer remains in business" and "five years thereafter." *Id.* § 75.4.

Finally, the regulators address the disclosure requirement. They stipulate that the statements that are to be affixed to materials containing depictions of actual sexually explicit conduct must contain the "title," "identifying number or similar identifier" of the work, the "date

of production, manufacture, publication, duplication, reproduction, or reissuance of the matter," and "[a] street address at which the records . . . may be made available." 28 C.F.R. § 75.6(a). Organizations must also include in the statement "the name, title, and business address of the individual . . . responsible for maintaining the records. . . ." *Id.* § 75.6(b). The statements are to be "prominently displayed" in or on the materials, *id.* § 75.8, and "must be accurate as of the date on which the [material] is sold, distributed, redistributed, or rereleased." *Id.* § 75.6(c).

Information obtained from the records that producers are required to create or maintain may not, "directly or indirectly, be used as evidence against any person with respect to any violation of law" other than "in a prosecution or other action for a violation of [section 2257] or . . . any applicable provision of the law with respect to the furnishing of false information." 18 U.S.C. § 2257 (d)(1) & (2). A producer is subject to prosecution under section 2257 for, among other things, the failure to create or maintain the required records and the knowing sale or "transfer, or offer for sale or transfer" of materials depicting actual sexually explicit conduct that do not contain the requisite statement disclosing the location of the records. *Id.* § 2257(f). Such violations are felonies: The maximum punishment for a first-time offender is two years of imprisonment and a fine; repeat offenders are subject to two to five years of imprisonment and a fine. *Id.* § 2257(i).

B. Procedural History

Appellees include trade associations and corporations that are engaged in, or whose members are engaged in, the "produc[tion] and distribut[ion of] visual images containing actual sexual conduct of *adults*." *American Library Ass'n v. Barr*, 794 F. Supp. 412, 416 n.4 (D.D.C. 1992) ("*ALA II*") (emphasis in original). In presenting their case to the district court, they argued

that, notwithstanding the 1990 amendments, the Act's record-keeping and disclosure requirements continue to place an unconstitutional burden on lawful speech and therefore violate the First Amendment. The district court agreed, finding that the requirements were not "narrowly tailored to achieve a significant legislative goal." *Id.* at 418. The court explained that

> the Act's primary flaw is that it applies to all depictions of actual sexually explicit conduct regardless of the age or even the apparent age of the model. Thus, the Act sweeps equally under its scope visual depictions of people who are sixteen, twenty-five, forty and sixty years old. While the government has every right to regulate—or even ban—such depictions of underaged persons, it does not even bear a rational relationship to its goal to regulate equally all sexually explicit art regardless of the model's age, even when that age is known.

Id. at 417. The court also concluded that the Act's "severe" penalties and "extremely burdensome" record-keeping requirements would impose "substantial burdens" that would "stifle much of Plaintiffs [sic] protected expression." *Id.* at 418. Accordingly, the court "enjoin[ed] enforcement of [the] Act as it applies to records that must be kept pertaining to images of adult models," and ruled that the "Act may not be applied to [appellees] and other producers of such images who use due diligence to satisfy themselves that the subjects in these images are over 18 years of age." *Id.* at 419. It found the Act constitutional, however, "as applied to images of models under 18 years of age." *Id.*

II. Discussion

We dismiss at the outset the Government's claim that appellees have brought a pre-enforcement facial challenge to the Act and must therefore establish that the statute is "unconstitutional in every conceivable application" or

that it is "substantially overbroad," citing *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984), and *New York v. Ferber*, 458 U.S. 747, 771 (1982). Appellees respond that theirs is not a facial challenge; they assert that the Act is unconstitutional as it applies to them. *Cf. Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (noting that litigants bring a facial challenge where they attack "a statute not because their own rights of free expression are violated, but because . . . the statute's very existence may cause others not before the court to refrain from constitutionally protected speech"). To be sure, the Act has never been enforced. It nonetheless imposes present-day burdens on several of the appellees as the producers of sexually explicit materials. Should we credit their challenge, appellees presently are suffering injury in violation of the First Amendment. As the district court noted, "[n]o jury conviction or prosecutorial discretion can relieve them of the immediate burdens which compliance will bring." *ALA II*, 794 F. Supp. at 416 n.4.

A. Standard of Review

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Supreme Court has ruled that the production and distribution of pictures of adults engaged in sexual acts is protected by the First Amendment so long as they are not obscene. *See Miller v. California*, 413 U.S. 15, 24 (1973); *see also Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 79 (1989) (noting existence of "line between protected pornographic speech and obscenity"). Under the Act and its implementing regulations, Congress has imposed certain burdens on persons who produce such materials for commercial distribution in interstate or foreign commerce. The question is whether these burdens unconstitutionally restrict the producers' protected speech.

To answer that question, we must first determine the level of scrutiny that is applicable to the Act's record-keeping and disclosure requirements. *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994) ("because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny applicable"). "[T]he appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). If it does, the statute is subject to strict scrutiny. *Id.* "Content-based regulations are presumptively invalid," *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992), and survive constitutional review only if they promote a "compelling interest" and employ "the least restrictive means to further the articulated interest." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

In contrast, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broadcasting*, 114 S. Ct. at 2445 (citation omitted). Thus "content-neutral regulations that have an incidental effect on First Amendment rights will be upheld if they further an important or substantial governmental interest." *Walsh v. Brady*, 927 F.2d 1229, 1235 (D.C. Cir. 1991) (internal quotation marks omitted).

As the Supreme Court has acknowledged, "[d]eciding whether a particular regulation is content-based or content-neutral is not always a simple task." *Turner Broadcasting*, 114 S. Ct. at 2445. In order to determine whether a statute is content neutral,

> [t]he principal inquiry . . . , in speech cases generally and in time, place, or manner cases in partic-

> ular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting, with emphasis, *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (citations omitted)). In the term just completed, the Supreme Court twice reemphasized the key role of the Government's purpose in determining whether a particular statute is content based or content neutral. *See Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2523 (1994) ("We thus look to the government's purpose as the threshold consideration"); *Turner Broadcasting*, 114 S. Ct. at 2461 ("Congress' overriding objective in enacting [statute] was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable.")

Two cases are directly relevant to our inquiry. The first is *United States v. O'Brien*, 391 U.S. 367 (1968), where the Court upheld a law that prohibited the destruction of Selective Service registration certificates—draft cards. *O'Brien* noted that

> [t]his Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in *regulating the nonspeech element* can justify incidental limitations on First Amendment freedoms.

Id. at 376 (emphasis added). In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court used analogous reasoning to conclude that a zoning ordinance barring "adult" (but not mainstream) movie theatres from locating within 1,000 feet of any residence, church, park, or school was a valid content-neutral time, place, and manner regulation. While acknowledging that "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters," the Court concluded that it was "aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community." *Id.* at 47 (emphasis in original). The Court later explained its decision in *Renton* in this manner:

> So long as the justifications for regulation have nothing to do with content, *i.e.*, the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters, we concluded that the regulation was properly analyzed as content neutral.

Boos v. Barry, 485 U.S. 312, 320 (1988). In both *O'Brien* and *Renton*, the Court applied an intermediate level of scrutiny. *O'Brien*, 391 U.S. at 377; *Renton*, 475 U.S. at 50.

There can be no question but that Congress's sole purpose in adopting section 2257 was to address what the Attorney General's Commission on Pornography found to be an important deficiency in the existing child protection laws:

> Despite the umbrella protection provided by the Child Protection Act of 1984, loopholes remain that permit the continued exploitation of children. For example, experts and law enforcement officers have found it difficult to extend this protection because in many instances, ascertaining the real ages of adolescent performers is impossible. By viewing a

> visual depiction, how does one decide if the performer is fourteen or eighteen, seventeen or twenty-one?

1 Attorney General's Commission on Pornography, Final Report at 620 (1986) ("Final Report"). To address this problem, the Commission urged adoption of the recordkeeping requirements that Congress incorporated in section 2257:

> The recommended legislation would require producers to obtain release forms from each performer with proof of age. The forms would be filed at a specified location listed in the opening or closing footage of a film, the inside cover of the magazine or standard locations in or on other material containing visual depictions.
>
> The name, official title and location of the responsible person or corporate agent supervising such records would also be listed to avoid use of corporate shields. The release forms should be available for inspection by any duly authorized law enforcement officer upon demand as a regulatory function for the limited purposes of determining consent and proof of age. . . .
>
> A producer should be required to maintain these records for a minimum period of five years. . . . This legislation would not only protect minors from abuse, but it would also place the burden of ensuring this protection was implemented squarely on the producers of the materials. The proposed legislation would serve a record keeping purpose comparable to that found in environmental and similar statutes.

Id. at 621-22 (footnotes omitted). The Commission also recommended that "[t]he recordkeeping obligation . . . be imposed on wholesalers, retailers, distributors, producers and any one [sic] engaged in the sale or trade

of sexually explicit material" in order to "afford protection to minors through every level of the pornography industry." *Id.* at 619.

From the above, we conclude that the congressional purposes in enacting the challenged provisions are threefold: (a) to prevent the exploitation of children by requiring those responsible for photographing or videotaping sexually explicit acts (those defined in the regulations as "primary producers") to secure proof of the performer's age and to keep a record of the same as evidence of their compliance, (b) to deprive child pornographers of access to commercial markets by requiring secondary producers to inspect (and keep a record of) the primary producers' proof that the persons depicted were adults at the time they were photographed or videotaped, and (c) to establish a system by which a law enforcement officer in possession of materials containing depictions of sexually explicit acts will be able to identify the performers and verify compliance with the Act.

Appellees argue, nevertheless, that whatever the purposes of the recordkeeping and disclosure requirements, the Act must be deemed content based, and therefore subject to the strict scrutiny standard, because its requirements are triggered by speech of a particular content. Cases like *Renton* make clear, however, that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech [exists when] the subclass happens to be associated with particular 'secondary effects' of the speech. . . ." *R.A.V.*, 112 S. Ct. at 2546. Our analysis here thus focuses upon whether the Act is "*justified* without reference to the content of the . . . speech." *Id.* (quoting *Renton*, 475 U.S. at 48; emphasis in original). Here, it is clear that Congress enacted the Act not to regulate the content of sexually explicit materials, but to protect children by deterring the production and distribution of child pornography.

That conclusion is reinforced by "[t]he design and operation of the challenged provisions." *Turner Broadcasting*, 114 S. Ct. at 2461. Section 2257 does not ban any kind of sexually explicit materials; rather, it imposes certain requirements on those who produce them. In this respect, the Act is comparable to the zoning ordinance at issue in *Renton*, which the Court found to be content neutral. That ordinance "[did] not ban adult theaters altogether, but merely provide[d] that such theaters may not be located within [certain areas]." 475 U.S. at 46. The Court found that the ordinance "by its terms [was] designed to prevent crime, protect the city's retail trade, [and] maintain property values . . . , not to suppress the expression of unpopular views." *Id.* at 48 (internal quotation marks omitted). The Act's record-keeping and disclosure requirements do not impinge on the content of the materials; rather, they are designed to deter the exploitation of children and to facilitate the identification of performers depicted in sexually explicit materials. *Compare Turner Broadcasting*, 114 S. Ct. at 2468 (describing two state tax laws subjected to strict scrutiny because "[a]lthough there was no evidence that an illicit governmental motive was behind either of the taxes, both were structured in a manner that raised suspicions that their objective was, in fact, the suppression of certain ideas"). In sum, while the *Renton* ordinance and section 2257 may impose certain obligations on the speakers, they place no restrictions on the speech itself.

Appellees assert, however, that the Act must be deemed content based because it applies to a category of persons that is defined by the content of the materials they produce. But again, the fact that those covered by the Act are content defined does not affect the content of the speech they are engaged in producing and distributing. In *Renton*, the Supreme Court concluded that the zoning ordinance at issue was content neutral even though it applied only to a content-defined class of movie theaters.

475 U.S. at 47-48. There, the ordinance addressed collateral harms unrelated to whatever thoughts the theaters' films might communicate to their viewers. *Id.* at 48-49. Similarly, section 2257 applies to speech of a particular content not because of any concern over the thoughts it might convey, but because the evil the law was designed to address—the use of underage performers—has its locus in the speech's production. *Cf. R.A.V.*, 112 S. Ct. at 2546 (a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech [exists when] the subclass happens to be associated with particular 'secondary effects' of the speech so that the regulation is '*justified* without reference to the content of the . . . speech.'" (quoting *Renton*, 475 U.S. at 48; emphasis in original)). The Supreme Court has cautioned that "[i]t would be error to conclude . . . that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." *Turner Broadcasting*, 114 S. Ct. at 2468. "[T]he fact that a law singles out a certain medium . . . 'is insufficient by itself to raise First Amendment concerns.'" *Id.* (quoting *Leathers v. Medlock*, 499 U.S. 439, 452 (1991)).

Finally, appellees argue that section 2257 is content based because the record-keeping and disclosure provisions are so burdensome that they will chill at least some constitutionally protected speech, citing the Supreme Court's decisions in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 254, 256 (1986); and *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). Such requirements, to be sure, may "create a disincentive . . . to engage in [protected] speech." *Massachusetts Citizens for Life*, 479 U.S. at 254. But the "mere assertion of some possible self-censorship resulting from a statute is not enough to render [a] law unconstitutional. . . ." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989). In any event, these cases are readily

distinguishable. All three deal with various issues of disclosure requirements and contribution restrictions in the context of political speech. But more fundamentally, in none of them does the Court discern a legislative purpose wholly unrelated to the suppression of speech. To the contrary, all three cases involve direct restraints on speech-related expenditures. *See Austin*, 494 U.S. at 655-56 (state statute barring corporations from making contribution and independent expenditures in connection with state candidate elections); *Massachusetts Citizens for Life*, 479 U.S. at 241 (federal provision proscribing expenditures from corporation's treasury funds in connection with an election); *Buckley*, 424 U.S. at 39 (federal provision imposing limitations on expenditures "relative to a clearly identified candidate"). The Act, by contrast, places no comparable restraints on speech.

For all of these reasons, we conclude that the requirements imposed by the Act are addressed to legitimate governmental concerns that are unrelated to speech. Congress passed the Act in order to prevent the use of underage performers in the production of sexually explicit materials. The First Amendment affords no protection to such conduct. *New York v. Ferber*, 458 U.S. 747, 763-66 (1982). Hence, the Act satisfies the content-neutral formulation established in *O'Brien:* Producers of sexually explicit materials engage in conduct that potentially contains both protected (sexually explicit depictions of adult performers) and unprotected (sexually explicit depictions of underage performers) speech, and the Act permissibly targets the latter. *Accord Turner Broadcasting*, 114 S. Ct. at 2464, 2469 (citing *O'Brien* to apply intermediate scrutiny to provisions requiring cable companies to broadcast local programming because Congress's intent was to ensure that free local broadcast television remained available to those without cable).

While the effects of the Act's record-keeping requirements on speech are not insubstantial, they are incidental

and largely unavoidable. The Act will pass constitutional muster

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. Later decisions make clear that once a regulation is deemed content neutral, this inquiry reduces to whether the requirements "are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (internal quotation marks omitted); *see Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 & n.8 (1984) (equating the *O'Brien* test with "the standard applied to time, place, or manner restrictions"). We turn now to this task.

B. Application

1. *In general*

Appellees concede, as they must, that the Government has a significant—indeed compelling—interest in the prevention of child pornography. *See Ferber*, 458 U.S. at 756-57 (upholding statute barring promotion of sexual performances by children under 16 and noting that "a State's interest in safeguarding the physical and psychological well-being of a minor is compelling") (internal quotation marks omitted). Nor do they deny that the Act leaves open ample avenues for the communication of sexually explicit materials. Indeed, the Act, by its terms, bans no form of expression. Appellees' sole (and vigorously argued) complaint is that the Act's recordkeeping requirements are not narrowly tailored to the prevention of child pornography.

In addressing this argument, we are reminded that a narrowly tailored regulation "need not be the least restrictive or least intrusive means" of serving the government's content-neutral interests. *Ward*, 491 U.S. at 798; *accord Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 478 (1989) ("to be 'narrowly tailored' . . . we have not insisted that there be no conceivable alternative, but only that the regulation not burden substantially more speech than is necessary to further the government's legitimate interests. And we have been loath to second-guess the Government's judgment to that effect.") (citations and internal quotation marks deleted); *Clark*, 468 U.S. at 299 (rejecting the "view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest"); *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984) (plurality opinion) ("The less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation"). But "[a] regulation is not narrowly tailored—even under the more lenient tailoring standards applied in *Ward* and *Renton*—where . . . a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals." *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 511-12 n.** (1991) (internal quotation marks and citations omitted). We conclude that a regulation will meet the Supreme Court's "narrowly tailored" requirement if a substantial portion of the burden it imposes furthers the Government's interest, even though a less intrusive alternative might also exist.

Our inquiry, then, is whether the Act's record-keeping requirements are narrowly tailored to the prevention of child pornography. To begin, it seems obvious to us that, as a general matter, the requirements of section 2257 advance the abatement of child pornography in fundamental ways. By requiring that primary producers

inspect and make a record of documentary evidence of the performers' ages and, in turn, that secondary producers inspect and retain a copy of the same, section 2257 forwards three goals: It ensures that primary producers actually confirm that a prospective performer is of age; it deters children from attempting to pass as adults; and, most important, it creates the only mechanism by which secondary producers (who by definition have no contact with performers) can be required to verify the ages of the individuals pictured in the materials they will be producing. Absent the primary producers' records, they can always plead honest mistake; and this is precisely the problem that prompted the Commission to recommend passage of the Act:

> The Commission found that producers, catering to the child pornography market, often used very young-looking performers in order to give the viewer the impression they were minors. Except in the most obvious instances, no one could be certain whether the performers really were under the age of eighteen. That not only hindered prosecution of child pornography offenses *but also provided an excuse to those in the distribution chain, who could profess ignorance that they were actually dealing in sexual materials involving children.* Producers too could escape the laws' sanction by claiming they were misled about the performer's age or did not know the performer's true identity.

ALA I, 956 F.2d at 1182 (internal citations omitted; emphasis added). Such defenses, of course, would be unavailing in a prosecution or other action for failure to create or maintain the records required by the Act. *See* 18 U.S.C.A. § 2257(f)(1). Primary producers of sexually explicit materials are required to obtain information of the performer's age and identity, 28 C.F.R. § 75.2(a), and secondary producers are prohibited from reproducing such materials without obtaining this information from the primary producers. *Id.* §§ 75.1(c)(2), 75.2(b).

Appellees object that the Act will do little to encourage primary producers to secure documentary confirmation of their subjects' ages because virtually all those engaged in providing sexually explicit materials for commercial markets already require such evidence. They assert, moreover, that as a practical matter a "reasonable mistake" defense is not available in child pornography cases. Although they acknowledge that the Ninth Circuit has held that the 1977 Act as amended (current version at 18 U.S.C. § 2251(a) (Supp. II 1990)) is "subject to a reasonable mistake of age defense," *United States v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 858 F.2d 534, 543 (9th Cir. 1988), they argue that that defense may only be used by those who have "diligently investigated" the performers' age, and that such an investigation requires the viewing of identification documents. Even assuming that these assertions are correct, however, the record-keeping obligations imposed on primary producers remain elements of the statutory scheme that are critical to ensuring that secondary producers deny child pornographers access to their markets.

In light of the above, we cannot agree with appellees that the Act serves no meaningful purpose given the existence of other criminal laws prohibiting child pornography. While it is true that we observed, in *ALA I*, that "it is hard to imagine anyone who would willingly risk 10 years of their life to publish [child pornography], but would refrain if they also would be risking" confiscation of property for not abiding by the 1988 Act, 956 F.2d at 1191, that remark was addressed to the efficacy of adding use forfeiture to the existing penalties. Here we deal with a law imposing new requirements that have a significant independent enforcement purpose. After fourteen months of investigations, the Commission on Pornography recommended that "Congress should enact a statute requiring the producers . . . of sexually explicit visual depictions to maintain records containing consent forms and proof of performers' ages," precisely because

of "gaps" and "loopholes" in existing law that facilitated the exploitation of children. Final Report at 618-20. The Act accomplishes these ends by ensuring that honest but careless producers secure documentary evidence of a performer's age and by denying unscrupulous producers the defense that they reasonably believed the performer to be of age.

We also reject appellees' contention that the Act is substantially overinclusive. Based on their contention that little commercially produced child pornography exists, they maintain that the Act applies almost entirely to constitutionally protected depictions of adults. This argument mistakenly assumes that burdening such materials will not further the Government's interest in preventing child pornography. To the contrary, the statutory scheme depends upon requiring producers to identify and maintain records of *every* performer who appears in their sexually explicit materials. The entire point of the Act is to prevent subjective determinations of age by implementing a uniform procedure that applies to all performers. *Compare, e.g.*, 8 U.S.C. § 1324a(b) (1988 & Supp. III 1991) (requiring employers to verify and maintain proof of verification of every employee's right to work in the United States).

Absent documentation, such determinations are not easy. Where pornographic materials are concerned, "[p]erhaps the single most common feature of models is their relative, and in the vast majority of cases, absolute youth," Final Report at 855, with most female models appearing to have "[begun] their careers in their late teens." Final Report at 855. As the Commission points out, "[b]y viewing a visual depiction, how does one decide if the performer is fourteen or eighteen, seventeen or twenty-one?" *Id.* at 620. The Government must be allowed to paint with a reasonably broad brush if it is to cover depictions of all performers who might conceivably have been minors at the time they were photographed or videotaped. We agree with appellees'

suggestion that certain applications of the record-keeping requirements may well exceed constitutional bounds, an illustrated sex manual for the elderly being an obvious example. They fail to present us, however, with the concrete facts that would enable us to test the limits of the Act. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985) ("These cases do not require us to identify or define what affirmative limits" the Constitution may impose.) Those are best determined in case-by-case tests.

Appellees also argue that the Act must be found unconstitutional on the basis of *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501 (1991). The statute at issue in that case required that any money earned by a criminal from a book describing his crime be paid into an escrow fund for the benefit of any victim who secured a judgment against him. Applying strict scrutiny, the Court found that "the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them," *id.* at 509, but concluded that the law was "significantly overinclusive" because it applied to (and thus burdened) a large number of protected works in the process. *Id.* at 511. The Court stated in dicta that the law was "so overinclusive" that it would fail even were it content neutral. *Id.* at 511-12 n.**.

Appellees maintain that because the Act principally applies to adult performers, it mostly burdens protected speech and is void under *Simon & Schuster*. We disagree. In that case, the challenged law was found to be overbroad because it reached "a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated" and because the statute was so worded that it could apply to "any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted." *Id.* at 511. Moreover, while the stated purpose of the law was to escrow the author's earnings for the benefit of victims, it left untouched "any of the crimi-

nal's other assets." *Id.* at 510. The Act, by contrast, burdens only that protected speech necessary to advance the Government's interest in preventing child pornography. Unlike the law in *Simon & Schuster*, it is essential to Congress's design that the Act impose its record-keeping requirements on all performers who appear in sexually explicit materials.

2. *Objections to specific applications and provisions of the Act*

Here, as elsewhere, the devil lies in the details. Appellees challenge a host of specific requirements and applications of the Act and its implementing regulations. We address those that merit discussion, beginning with challenges to the application of the record-keeping provisions.

a. Record-keeping requirements

The record-keeping required of producers can hardly be considered onerous. Such records are routinely required to facilitate the enforcement of our immigration, labor, and tax laws. *See, e.g.*, 8 U.S.C. § 1324a(b) (employers must verify identities of employees and maintain proof of verification); 29 C.F.R. § 516.2(a)(3) (1993) (employers must, *inter alia*, verify their employees' birthdates); 26 C.F.R. 31.6001-2(a)(1)(i) (1993) (employers must maintain records of employees' names and addresses). Appellees maintain, nevertheless, that the Act's record-keeping requirements impose an impermissible burden on secondary producers.

It should be noted at the outset that while secondary producers must maintain records of the ages and identities of the performers depicted in their materials, they

> may satisfy the[se] requirements . . . by accepting from the primary producer . . . copies of [the primary producer's] records . . . [and by keeping rec-

> ords of] the name and address of the primary producer from whom he received copies of the records.

28 C.F.R. § 75.2(b). The Justice Department interprets this provision as enabling secondary producers not in privity with the primary producer to rely on the records provided them by the immediately preceding secondary producer, and so advised the district court. *See* Reply Brief for Appellant at 9.

Contrary to what appellees suggest, the secondary producers' records serve important ends. They confirm the secondary producers' compliance with the Act and provide what is likely to be a more reliable depository of the information identifying and establishing the ages of the persons depicted. The photographer who sells a picture to a magazine may disappear three months later, and his records with him. The magazine, on the other hand, is apt to remain in business. Furthermore, because a given issue of a magazine or book may contain pictures of performers taken by several photographers, it serves the interests of law enforcement efficiency to be able to verify their ages at a single location. Finally, the requirements imposed on secondary producers serve the Government's interests by denying their commercial markets to child pornographers.

Appellees assert, nonetheless, that specific features of the record-keeping requirements unacceptably burden speech. They begin with the regulatory mandate that "[s]uch records . . . be maintained as long as the producer remains in business" and "for five years thereafter." 28 C.F.R. § 75.4. The Government's need to be able to identify performers and verify conformance with the Act is not dependent on the producer remaining in business. Therefore, the section's requirement that the records remain available for a minimum period of five years, whether or not the producer continues in existence, appears reasonable. The obligation imposed by the regulation, however, is open ended. The Government has of-

fered no reason why the containment of child pornography requires the maintenance of these records indefinitely, and we can think of none. We therefore set aside section 75.4's requirement that the records "be maintained as long as the producer remains in business." Pending its replacement by a provision more rationally tailored to actual law enforcement needs, we will accept a period of five years as reasonable. We do so because it conforms with both the five-year statute of limitations applicable to the Act, 18 U.S.C. § 3282 (1988), and the minimum period recommended by the Pornography Commission. Final Report at 621.

Appellees also challenge the Act's requirement that producers "ascertain any name . . . ever used by the performer," 18 U.S.C. § 2257(b)(2), and the regulation's requirement that their records be cross-referenced and retrievable as to

> [a]ll name(s) of each performer, including any alias, maiden name, nickname, stage name or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, or other matter.

28 C.F.R. § 75.3. They maintain that these provisions are not only onerous (the first being virtually impossible to satisfy—short of employing a detective agency), but do nothing to deter the production of child pornography. The Government, however, interprets section 2257(b)(2) as merely requiring that producers record the aliases and other names provided by the performer in response to a request, citing the President's message transmitting the 1988 Act to Congress. *See* H.R. Doc. No. 100-129, 100th Cong., 1st Sess. 65 (1987) ("This requirement is satisfied if the producer asks the performer for the information.").

So interpreted, the requirement that the primary producer record other names used by a performer imposes a

nominal burden at best. We find this appropriate to the protection of children because it enables enforcement officials to detect forged documentation. To illustrate, if it is determined that a particular woman had been pictured using aliases in 1990 and 1991 and using her own name in 1992, and if the documents in the records indicate an age of 18 on each occasion, it may be inferred that at least two of them are forged and that she was likely to be underage on the first two occasions. The cross-referencing of the records allows enforcement officials to locate the documents for comparison.

b. Labeling requirements

We now address appellees' concerns over the statements that both primary and secondary producers must affix to materials depicting sexually explicit conduct. 18 U.S.C. § 2257(e). The regulations provide, in relevant part:

> (a) Every statement shall contain:
>
> (1) The title of the book, magazine, periodical, film, or videotape, or other matter . . . or, if there is no title, an identifying number or similar identifier . . .;
>
> (2) The date of production, manufacture, publication, duplication, reproduction, or reissuance of the matter; and
>
> (3) A street address at which the records required by this part may be made available. . . .
>
> . . .
>
> (c) The information contained in the statement must be accurate as of the date on which the book, magazine, periodical, film, videotape, or other matter is sold, distributed, redistributed, or rereleased.

28 C.F.R. § 75.6(a)-(c).

As a general matter, we find permissible the requirement that producers affix statements to sexually explicit materials that identify where proof of the depicted per-

formers' ages may be found. Requiring the creation of records is of little avail if they cannot be readily located. We do not find it overly burdensome to require that such statements be printed near the beginning of a book or magazine, or placed at the beginning or end of a film or videotape. *See* 28 C.F.R. § 75.8. Appellees nevertheless challenge, as both overbroad and unnecessary to the purposes of the Act, the requirement that the statement be accurate "as of the date on which [the sexually explicit material] is sold, distributed, redistributed, or rereleased." 28 C.F.R. § 75.6(c).

On its face, the regulations' updating requirement would reach wholesale and retail transactions that lie entirely beyond the scope of the Act. *See id.* at § 75.1(d) (defining "sell, distribute, redistribute, and rerelease" to include "commercial distribution of a book, magazine, periodical, film, videotape, or other matter" covered by the Act). The Act, however, imposes the obligation to keep records and affix statements only on those who "produce[] any book, magazine, periodical, film, videotape, or other matter which . . . contains . . . depictions . . . of actual sexually explicit conduct," 18 U.S.C. § 2257(a)(1); and it defines "produces" to mean "produce, manufacture, or publish any [such material] . . . and includes the duplication, reproduction, or reissuing of any such matter." *Id.* § 2257(h)(3). Because the Act does not apply to those solely engaged in the sale of these items, its requirements may not be imposed on them. The Act cannot be read to require a magazine vendor, for example, to revise the statement in a pornographic periodical "as of the date on which [it] is sold" to a consumer. We find, however, that it is entirely appropriate to require that the information contained in the statement be accurate as of the date that such materials are published, produced, republished, or reproduced (in the sense of "produced anew"); and we uphold section 75.6(c) insofar as it is so applied. *Cf.* Final Rule, 57 Fed. Reg. at

15020 ("the location statement must be current at the time of republication or reproduction").

Another objection concerns the application of the disclosure requirement to photographs exhibited in an art gallery. Because section 75.8 requires that such statements "be prominently displayed," appellees assume that the statement would have to be affixed to the front of the photograph, thereby compromising its artistic integrity. This is sheer speculation. We suggest there may be other ways in which the purposes of the Act may be achieved without interfering with the aesthetics of photographs portraying sexual acts—such as affixing the statements to the backs of the pictures. Be that as it may, this question, and others like it, cannot be decided on the basis of hypotheticals. "We possess no factual record of an actual or imminent application of [the Act (or the disclosure requirement) to photographs exhibited in an art gallery] sufficient to present the constitutional issues in clean-cut and concrete form." *Renne v. Geary*, 501 U.S. 312, 321-22 (1991).

c. Other challenges

We are left with four "as applied" objections that warrant discussion, two of them advanced by the district court. The first objection involves "appropriationist artists," photographers who create distinct works that incorporate photographs taken by others—typically, without permission. The record confirms that appropriationists constitute a recognized school of art photography. Appellees assume that appropriationists are primary producers and assert that this imposes on them the impossible task of having to identify and maintain records of performers who appear in pictures taken by other photographers whom they may not be able to locate and whose cooperation (if they are located) can hardly be guaranteed. We disagree with their premise, but understand their mistake. The regulations define a primary producer as "any person

who actually films, videotapes, or photographs *a visual depiction of* actual sexually explicit conduct," 28 C.F.R. § 75.1(c)(1) (emphasis added). The italicized language is a tautology, however, because the obvious purpose for creating the category of primary producers is to identify those who have direct contact with the performers and can therefore personally examine and record the identification documents presented by them. Nevertheless, appropriationists appear to fall within the definition of "secondary producers." If they do, the application of the Act to them would raise a serious First Amendment problem because of the difficulty they may encounter in securing the information that secondary producers are required to keep on file. It is a problem, however, that cannot be resolved on the present record. *See Renne*, 501 U.S. at 321-22.

The next objection concerns the inclusion within the definition of "secondary producers" of persons who duplicate or reproduce sexually explicit materials that are intended for commercial distribution. 28 C.F.R. §75.1 (c)(2). Appellees point out that such persons include printers, film processors, and video duplicators whose roles are functionally indistinguishable from that of photo processors, who are specifically excluded from the definition of "producer." *See id.* § 75.1(c)(4)(i). As we understand the photo processing exception, it applies to persons to whom a producer delivers films for development or the making of prints and who, on completing their work, return the films and prints to the producer. The Government does not explain what interest is served by according different treatment to printers, film processors, and video duplicators whose sole function is to provide similar services to a producer. We agree, therefore, that the Act does not apply to persons who perform such services and return their work product to the producer who employed them.

Third, we address the district court's contention that "the Act is overly burdensome because it will invade the privacy of adult models and discourage them from engaging in protected expression" because "[e]xposure of their true names, aliases, and addresses could subject them to stigmatization, harassment and ridicule from others." *ALA II*, 794 F. Supp. at 419. The Act and its implementing regulations, however, do not require that this information be disclosed to anyone other than "the Attorney General or his delegee," 28 C.F.R. § 75.5, the persons for whom they willingly pose while engaged in sexual acts, and those who publish the resulting pictures or videotapes. The first of these has a legitimate right to the information, and we believe we may safely assume that the performers are not concerned over the prospect of being stigmatized, harassed, or ridiculed by the producers they help enrich.

Finally, we reject the district court's complaint that the Act "will effectively ban foreign produced images of sexually explicit conduct." *ALA II*, 794 F. Supp. at 418. Foreign producers who wish to peddle their products in the United States should be expected to abide by our laws no less than domestic producers. *Compare, e.g.*, 17 U.S.C. § 602 (1988) (prohibiting the importation of works that infringe on U.S. copyrights). Although the Government may not have other than a humane interest in protecting foreign children from exploitation, it has a most definite interest in plugging a loophole that would be created for domestic child pornographers if they were able to send their wares to secondary producers abroad for reexport to the United States.

III. Conclusion

For the reasons described above, we conclude that the Act is a content-neutral statute that serves a compelling Government interest; and we find that its provisions meet the intermediate scrutiny standard established by the Su-

preme Court's First Amendment jurisprudence. We acknowledge that certain provisions and potential applications of the regulations exceed or may exceed constitutional bounds. Nevertheless, we are satisfied that the Act and regulations are constitutional as they apply to the vast majority of the materials affected by them, namely, the commercially produced books, magazines, films, and videotapes that cater to "adult" tastes. Therefore, although we disallow certain provisions or applications of the regulations, we reverse the district court's holding that the Act is unconstitutional as it applies to materials depicting adults engaged in actual sexual conduct.

So ordered.

REYNOLDS, *District Judge*, dissenting. This law is overbroad, chilling, and a questionable deterrent to child pornography, and thus runs contrary to the First Amendment. The majority opinion permits an unwarranted intrusion into the First Amendment rights of citizens who are not child pornographers. Therefore, I respectfully dissent.

The statute regulates a wide variety of material—some kinds more protected by the First Amendment than others. Some material covered by the statute is "obscene" under *Miller v. California*, 413 U.S. 15 (1973),[1] or is child pornography, and not protected speech at all. *See New York v. Ferber*, 458 U.S. 747 (1982). Some of the material is "indecent," but indecent, non-obscene speech is protected by the First Amendment, albeit the trend in Supreme Court cases appears to be to relax the standard of review for such speech. *Compare Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (ban on indecent telephone message services violated the First Amendment because it exceeded what was necessary to serve the compelling interest of preventing exposure of minors to the messages) *with Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (Rehnquist, J., plurality opinion) (nude dancing is only marginally within the parameters of First Amendment protection). The law also regulates depictions which may have a significant educational,

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[1] In order to determine whether material is "obscene," the Supreme Court has formulated a three-part test:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable . . . law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citation omitted).

artistic, or political value, and which receive full First Amendment protection.

Although the statute reaches far beyond depictions which involve or are likely to involve children, it regulates each of these areas in the same burdensome manner. As such, the law is overbroad and chilling, and it is impossible to rewrite it through judicial means so that it survives First Amendment scrutiny.

I am not convinced that this statute is "content neutral." On its face, it is directed at a particular type of expression. This law does not have a merely "incidental limitation" on expression protected by the First Amendment. However, even under the more relaxed standard applied to content-neutral regulation of expressive conduct propounded in *United States v. O'Brien*, 391 U.S. 367 (1968),[2] this statute must be stricken. There is enough "bite" left in the *O'Brien* standard to strike a statute when it has more than incidental effects on First Amendment expression and does not effectively further an important governmental interest. The statute cannot even be used for its intended purpose of helping to prosecute child pornographers, because the Act itself precludes the use of the records, directly or indirectly, in a child pornography prosecution.

Thus, I would affirm the lower court's opinion.

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[2] Under *O'Brien*, a content-neutral government regulation of expressive conduct is justified if that regulation: (1) is within the government's constitutional power; (2) furthers a substantial governmental interest; (3) the governmental interest is unrelated to free speech; (4) incidental restrictions on First Amendment freedoms are "no greater than is essential to the furtherance of that interest." *Id.*

APPENDIX B

[Filed May 26, 1992]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-0394
(Stanley Sporkin)

AMERICAN LIBRARY ASSOCIATION, *et al.*,
Plaintiffs,

v.

WILLIAM BARR, Attorney General of the
United States, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

This case comes before the Court on Plaintiffs' and Defendants' Cross Motions for Summary Judgment and Defendant's Motion for Judgment on the Pleadings. Fed. R. Civ. P. 56, 12(c). The Plaintiffs in this case are a group of media, and trade associations, as well as individual artists, publishers and photographers.

Plaintiffs have brought this action challenging the constitutionality of the Child Protection Restoration and Penalties Enhancement Act of 1990, 18 U.S.C. § 2257 ("Act"). The Court finds that the Act, in conjunction with the regulations promulgated for its enforcement, in part runs afoul of the First Amendment. This Court will therefore declare unconstitutional and enjoin enforcement of the Act as it applies to production and distribution of visual images of adults.

BACKGROUND

A. *Procedural History*

The original Child Protection and Obscenity Enforcement Act was passed by Congress and signed into law on November 18, 1988. ("1988 Act"). That Act created a wide range of criminal enforcement tools to enable federal prosecutors to combat the serious problem of child pornography.[1] Most of those tools remain in effect today and are helpful to federal law enforcement efforts to end the serious harms that befall children who are the victims of such pornography. *Cf. New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348 (1982).

The one aspect of the Act that did not remain in effect after its passage was the extensive record keeping requirements imposed upon all producers of visual depictions of sexually explicit conduct. Judge Revercomb of this Court struck down those record keeping provisions as violative of the first amendment. *See American Library Association v. Thornburgh*, 713 F.Supp. 469 (D.C. Cir. 1989), *vacated as moot* 956 F.2d 1178 (D.C. Cir. 1992) ("*ALA I*"). Congress then passed the statute at issue in this case and Plaintiffs brought an action challenging the new record keeping requirements as overly burdensome as applied to protected rights of expression under the first amendment.

Plaintiffs initially appeared before the Court on a motion for a temporary restraining order on February 11, 1991. At that time, this Court expressed its concern over the scope of the Act. The Court believed that the

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[1] Those tools include the criminalization of possession with intent to distribute obscenity that crossed state lines, 18 U.S.C. § 1466, criminalizing possession with intent to distribute child pornography on government property, 18 U.S.C. § 1460, applying RICO to child pornography, 18 U.S.C. § 1961, and criminalizing transportation of a minor across state lines for use in child pornography, 18 U.S.C. § 2251 A, among others.

plain language of the Act, without regulations narrowing the breadth of material covered, would have resulted in burdening a wide range of admittedly constitutionally protected expression because the Act made absolutely no distinction based on the age of the model. *See* Transcript of Motion for TRO on Feb. 11, 1991 at 20-21 ("Tr."). The Act, which was signed into law on November 29, 1990, also required that "the Attorney General . . . prepare the initial set of regulations required or authorized by [the Act] within 60 days of the enactment of [the] Act."[2] That 60-day period expired prior to February, 1991 without any regulations being prepared.

This Court believed that before ruling on the constitutionally of the Act, the Attorney General should have the opportunity to narrow the statute's scope because it impacted on the first amendment. In lieu of an injunction, the parties entered into a Stipulation on February 26, 1991 that the Act would not be enforced until one month after the final regulations were published. The final regulations were published on April 24, 1992, and now both parties have moved for summary judgment based upon the Act and the regulations.

B. *The Act and the Regulations*

The Act, considered with the regulations, imposes extensive record-keeping and labelling requirements on the producers of visual images which depict actual sexually explicit conduct, *regardless of the age of the model.* The government concedes, as it must, that the Act applies to expression which is protected under the First Amendment.

1. *Scope and Penalties*

Under the Act, it is a felony punishable by up to two years imprisonment along with a substantial fine for a "producer" of material depicting "actual sexually explicit

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[2] § 312(1).

conduct" to fail to create and maintain the records required by the Act. For a second offense there is a mandatory minimum two year prison sentence. There is no *scienter* requirement for a producer failing to create or maintain the records required by the Act. Failure to keep the required records is a felony regardless of the age of the model. The Act applies to producers without regard to a transgressor's knowledge of his or her violation of the Act's requirements. By its own terms, however, none of the records kept as required by the Act can be used substantively against any person directly or indirectly as evidence in any prosecution for any violation of the law, including child pornography laws. Sec.(d)(1).

The Act also regulates distribution of covered material. Under the Act it is a felony to knowingly distribute any material which contains a visual image containing actual sexually explicit conduct unless the material bears a label describing where the required records are located.

The Act applies to distribution of material created by foreign producers. Because foreign producers are not subject to the Act's record keeping requirements, the Act will operate to ban distribution of a wide range of foreign-produced, sexually explicit material. That ban would operate regardless of the actual or apparent age of the model depicted.

2. *Record Keeping Requirements*

The wide scope and severe penalties imposed by the Act are exacerbated by the Act's burdensome record keeping provisions. The Act and regulations require that "primary" producers—or those who actually film or photograph a visual depiction of sexually explicit conduct —view each model's original photo identification documents and keep a record of each model's name and date of birth regardless of the age of the model. 28 C.F.R. § 75.2. In addition, a primary producer must ascertain every alias, nickname, stage name or professional name

of each model engaged in sexually explicit conduct. All such names must be listed in the retained records and these records must be cross indexed to be retrievable by every alias. 28 C.F.R. § 75.3. In addition, the records must be cross-indexed to be retrievable according to the title or other identifying feature of the book or other visual medium. *Id.* Many of the "producers" in the Plaintiffs' organizations are photographers or artists operating on their own or in small studios. *See* Declaration of Charlotte R. Murphy at ¶ 58; Declaration of Hank Londoner at ¶ 10-12.[3] The regulations at issue in this case can impose insurmountable burdens on such artists.

"Secondary" producers—or those who produce, assemble, publish, duplicate, reproduce, or reissue material containing a visual depiction of actual sexually explicit conduct—are also producers within the meaning of the Act and subject to the same regulations and penalties. *See* 28 C.F.R. § 75.1(c)(2). These producers often have absolutely no direct contact with the models. *See* Declaration of David J. Meyerson at ¶ 1, 7. In addition, many times there is a chain of intermediate, secondary producers between a given producer and the primary producer. *Id.* While the regulations do allow a secondary producer to keep "copies" of the required records, the regulations require that such copies can only be obtained from the primary producer. *See* 28 C.F.R. § 75.2(b).

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[3] One example of how the Act's requirements would impose virtually insurmountable burdens on protected expression is in the case of "appropriationist" artists. *See* Murphy Declaration at ¶ 8-22. These artists create their works by photographing sexually explicit materials from other sources and combining those pictures with other images to portray those images in new and different ways. *See Id* at Attachment 1, 2 *Aperture: The Body in Question*; Nan Goldin, *The Ballad of Sexual Dependency*. These artists have no contact with the primary producer or model. Moreover, they often produce strong feminist or political messages which might be critical of that producer so that it would be extremely difficult for these artists to be able to meet the Act's strict record keeping requirements and avoid committing a felony.

Each secondary producer must keep the name and address of the primary producer. *Id.* Thus, not only must numerous duplicate records be kept for the same visual depiction, but each secondary producer is required to obtain his or her copy only from the primary producer.

Finally, each producer is required to maintain all the required records for as long as the producer remains in business. 28 C.F.R. § 75.4. If the producer ceases to carry on business, a custodian must be named and the records must be maintained for an additional five years. *Id.* Failure of any producer or distributor to comply with these burdensome regulations is a felony regardless of the age of the model.

DISCUSSION

A. *Standing*

The Court begins by noting the areas in this case which are not disputed. First, the government has conceded that the National Association Of Artists' Organizations ("NAAO") and National Campaign ("NCFE") have standing to bring this action for declaratory and injunctive relief.

The NAAO and the NCFE represent artists and distributors who are primary producers, secondary producers, and distributors of images depicting actual sexually explicit conduct. Their standing in this case covers the entire spectrum of the Act and the regulations. Therefore, this Court need not address the issue as to whether the other Plaintiffs have standing. *See U.S. Dep't of Labor v. Triplett*, 110 S. Ct. 1428, 1431 (1990); *National Federation of Federal Employees v. U.S.*, 905 F.2d 400, 403-404, n.4 (D.C. Cir. 1990); 13A C. Wright & A. Miller § 3531.15 nn. 22-24 and accompanying text (1984 ed. & 1992 Supp.) ("If there are several plaintiffs, it is often sufficient to determine that some have standing, and then bypass the question whether others

also have standing.").[4] Therefore, this Court must reach the merits of the Plaintiffs' challenge to the Act's constitutionality.

B. *Level of Judicial Scrutiny*

It is also undisputed by either party that the government has a compelling interest in attempting to eradicate the evils associated with child pornography. *See New*

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[4] In addition to the government's concession, this Court has reviewed the record and has found ample evidence that the Plaintiffs in this case produce or distribute material which could reasonably be thought to contain depictions of actual sexually explicit conduct. *See* Declaration of David Myerson and Attachment 1, 2; Declaration of Suze Randall at ¶ 3; Declaration of Hank Londoner at ¶ 3. Thus, if the government is permitted to enforce the Act many of the Plaintiffs will be immediately required to comply with its record keeping requirements. They will be directly injured by the Act.

In addition, the government mischaracterizes Plaintiffs' challenge to the Act as a 'facial' challenge. The Plaintiffs in this case produce and distribute visual images containing actual sexually explicit conduct of *adults*. Their challenge, and this Court's ruling, is limited to the application of the Act to depictions of those over 18. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-504 (1985). Thus, Plaintiffs' case is unlike the situation faced by the Court of Appeals in reviewing the forfeiture provisions in *ALA I*. 956 F.2d 1178. In addition, unlike *ALA I* the Plaintiffs will suffer immediate injury in this case once the Act's record keeping requirements become effective. No jury conviction or prosecutorial discretion can relieve them of the immediate burdens which compliance will bring.

Plaintiffs are also within their rights to bring this preenforcement challenge to the Act. *See Brockett*, 472 U.S. at 504. The government does not contest that two of the Plaintiffs in this action will be subject to the Act's requirements and possible serious penalties for noncompliance. Especially when important first amendment rights are involved a citizen is not required "to take significant and costly compliance measures or risk criminal prosecution." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988). *See also Babbit v. United Farm Workers*, 442 U.S. 289, 298 (1979) (one challenging constitutionality not "required to await and undergo a criminal prosecution as the sole means of seeking relief.").

York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348 (1982). Since the harms inflicted upon the victims of such pornography are substantial, the government is to be lauded for its many successful efforts to protect its youngest citizens. *See* Attorney General's Comm'n on Child Pornography, Final Report (1986). Plaintiffs join the government in its condemnation of child pornography and steadfastly maintain that they only use adult models when depicting the type of graphic conduct covered by the Act.

It is also beyond dispute, however, that many of the images which Plaintiffs do produce and distribute, and which are subject to the Act's requirements, are not only legal but constitutionally protected. Those images involve adults and have nothing to do with child pornography. As the district Court in *ALA I* correctly observed:

> "It is worth noting at the outset that this is not a typical pornography case, in which the task is to determine where the line is to be drawn between protected first amendment material and that which may be prohibited. Here, it is clear that much material that is protected by the First Amendment will be subject to the record-keeping requirements . . ."

ALA I 713 F. Supp. at 473, *vacated as moot* 956 F.2d 1178 (D.C. Cir. 1992). This Court must construe the Act as a statute regulating expression protected by the First Amendment.

Plaintiffs and Defendants disagree as to the level of scrutiny which this Court must apply in evaluating the constitutionality of the Act. Plaintiffs argue that the Act must withstand the strict scrutiny which the Court must apply to a statute which regulates protected expression based on its content. A statute can withstand such scrutiny only if it is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end."

Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 509 (1991); *Riley v. National Fed'n of the Blind, Inc.*, 108 S. Ct. 2667, 2677 (1988); *Boos v. Barry*, 485 U.S. 312, (1988); *Talley v. California*, 362 U.S. 60 (1960).

Defendants maintain that the Act should be evaluated as a reasonable 'time, place, and manner' restriction on protected expression and need only satisfy the three part test which applies to such regulation. Such statutes are constitutional if they 1) are not justified based on the content of the expression regulated, 2) are "narrowly tailored to serve a significant governmental interest," and 3) leave open ample alternative channels for communication. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 798 (1984).[5] This Court need not determine which level of scrutiny is ap-

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[5] The government argues that lesser scrutiny is justified because sexually explicit material is *per se* entitled to lesser protection under the first amendment. It is worth noting, however, that a wide variety of expression will be affected by the Act. Some of the expression affected will be the type of material which might fall into the category of indecent expression, which has been recognized as protected to a lesser degree. *See Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991) (plurality opinion) (first amendment applied to nude dancing).

Plaintiffs have demonstrated, however, that the Act will also apply to many modern artists who use graphic sexual images combined with words to send powerful and highly political messages. *See e.g.*, Motion for Preliminary Injunction at Exhibit 1, Nan Goldin, *The Ballad of Sexual Dependency*; Declaration of David Meyerson at Exhibit A, *Penthouse*, September, 1990 at 148 "Cincinnati: City Under Siege" (article containing photographs by Robert Maplethorpe); *See also Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (certain sexual expression, especially if political, may be entitled to highest level of protection). Thus, the Act not only fails to distinguish between expression which is protected and that which is unprotected, but it fails to grant any different status to speech which is entitled to the highest degree of protection under the first amendment.

propriate in this case, however, because the Act must be struck down even under the less exacting test propounded by the government.

C. *The Act As Applied to Plaintiffs Violates the First Amendment*

The government, in its brief, asserts that the goal of the Act's record-keeping requirements is "to prevent pornographers from evading the federal ban on the use of minors in sexually explicit material by professing ignorance as to the age of the performer." Defendants' Memorandum In Support of Motion for Summary Judgment at 2. ("Def. Mem."). Because the government's interest is significant in this case, the sole questions before this Court are whether the means chosen in the statute are narrowly tailored to that interest and whether the Act leaves open ample alternative channels for communication. The answer to both questions must be in the negative.

1. *Narrowly Tailored Requirement*

Boiled down to its essence the Act's primary flaw is that it applies to all depictions of actual sexually explicit conduct regardless of the age or even the apparent age of the model. Thus, the Act sweeps equally under its scope visual depictions of people who are sixteen, twenty-five, forty and sixty years old. While the government has every right to regulate—or even ban—such depictions of underaged persons, it does not even bear a rational relationship to its goal to regulate equally all sexually explicit art regardless of the model's age, even when that age is known. The government has used a dragnet approach for dealing with important and delicate issues deserving of the most precise enforcement effort.

Indeed, the Plaintiffs have conceded the validity of the Act were it to be applied only to those who used models under 18. *See e.g.*, Cal. Labor Code § 1309.5(a) & (b)

(1990). The vast range of protected expression which falls under the Act's regulatory sweep alone requires it be found unconstitutional as applied to depictions of adults engaged in sexually explicit conduct.

So tenuous is the relation between the asserted government interest in this case and the statutory means of accomplishing that interest, that one wonders what Congress had in mind in bringing adult models into the Act's coverage. The terms of the Act itself preclude any use—whether direct or indirect—of recorded material in a child pornography prosecution. Thus, none of the records compiled by producers of the covered images, whether adults or children, can be used to aid in the fight against child pornography. Indeed, should the Act be read to establish something akin to "use immunity" for such material, the prosecutor of a child pornography case will be shouldered with the extra burden of showing that the prosecution is not tainted by any of the records kept in conjunction with the Act. *See ALA I* at 479. Second, although the government seeks to avoid the "harm" that occurs when a pornographer "profess[es] ignorance as to the age of the performer." Def. Memo. at 2, knowledge of the age of the model is not a required element in a prosecution under the Child Protection Act. *See United States v. United States Dist. Court for Cent. Dist. of Cal*, 858 F.2d 534 (9th. Cir. 1988).

This Court repeatedly questioned the government concerning the reason for subjecting all ages of models to the regulations and the Act. The government could give no valid rationale for the Act's wide scope. Thus, the Act is far from being an act narrowly tailored to achieve a significant legislative goal. It is more akin to off-the-rack legislation concocted to suit a government interest made from whole cloth. Such a regulation is unbefitting of a law affecting protected expression in our society.

1. *Alternative Avenues of Expression*

The substantial burdens imposed by the Act will stifle much of Plaintiff's protected expression. First, the penalties imposed for failing to keep the required records, even regrading protected expression, are severe and are imposed without any *scienter* requirement. Such dire consequences will surely chill expression. "Freedoms of expression require breathing space." *Hustler Magazine*, 108 S.Ct. at 880. Even when the government attempts to criminalize unprotected expression the Supreme Court has noted that strict liability cannot be imposed if it will "have the collateral effect of inhibiting the freedom of expression, by making the individual more reluctant to exercise it." *Smith v. California*, 361 U.S. 147, 151 (1959) (struck down criminal liability for possession of obscene book). In this case, however, the chilling effect is even more direct because the Act directly regulates protected expression. Thus, taking the risk that such serious penalties will not chill the expression of Plaintiffs is not acceptable under the first amendment.

Second, the record keeping requirements themselves, aside from the penalties, are extremely burdensome. First, the Act will effectively ban foreign produced images of sexually explicit conduct. Because foreign producers will not be subject to the Act's record keeping requirements, domestic distributors and secondary producers will be unable to use or distribute such material without committing a felony. In addition, as discussed above, the Act requires everyone in the entire chain of commerce to keep cross-referenced records concerning the same visual image. For many smaller artists or producers well down the chain this requirement may be entirely impossible to meet.

Defendants respond that such record keeping requirements are not uncommon in many other settings which are routinely regulated by the government and that, like the Act's restrictions on distributors, private parties are

often relied on to enforce such restrictions. Def. Memo. at 38-41 (*citing* 8 U.S.C.A. § 1324a (Immigration Control Act); 29 U.S.C. § 657 ("OSHA")). Those examples are inapplicable to this case. If the first amendment means anything at all, it prevents government from regulating protected expression the same way it regulates working conditions or immigration. That is true because, like immigration, "there is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of freedom of speech stand in the way of imposing a similar requirement on the bookseller." *Smith* at 152-53.

Finally, the Act is overly burdensome because it will invade the privacy of adult models and discourage them from engaging in protected expression. That, in turn, will limit the creators' and distributors' ability to engage in protected expression. Many of the artists and adult models engaged in sexually explicit visual imagery have an interest in maintaining their anonymity. Exposure of their true names, aliases, and addresses could subject them to stigmatization, harassment and ridicule from others.

The Supreme Court has "consistently refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 767 (1986). Anonymity may be especially important when protected expression is involved. *See Talley v. California*, 362 U.S. 60, 64-65 (1960) (statute criminalizing distribution of handbills without identifying speaker); *NAACP v. Alabama*, 357 U.S. 449 (1958). Thus, under the Act's provisions adults engaging in unpopular but protected expression are required to affirmatively come forward and subject themselves to the possibility of public harassment. The resulting invasion of their privacy and

chill on their expression would result in their silence. Therefore, this Court finds that the burdens imposed by the Act do not leave ample alternative routes of expression.

CONCLUSION

The Act places unconstitutional burdens on protected expression. Therefore, this Court must declare the record keeping and labeling provisions of the Act unconstitutional and enjoin their enforcement as applied to producers and distributors of the covered visual images of adults. The Act may not be applied to Plaintiffs' and other producers of such images who use due diligence to satisfy themselves that the subjects in these images are over 18 years of age.

What the drafters of the legislation have done is to create a dragnet that blankets all engaged in the depiction of sexually explicit conduct. The stated purpose of the Act is to deal with child pornography, i.e. sexually explicit activities of underaged models. If the Act's burdensome requirements were limited to records applicable to such individuals, it would be constitutional. It becomes impermissible only because the Act reaches all individuals engaged in sexually explicit conduct regardless of age. Those using adult models, represented by Plaintiffs in this case, must be excluded from the reach of the Act. Accordingly this Court will enjoin enforcement of Act as it applies to records that must be kept pertaining to images of adult models. The Act, however, is constitutional as applied to images of models under 18 years of age.

A separate Order accompanies this Opinion.

DATE: 5/26/92

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Court

[Filed May 26, 1992]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-0394
(Sanley Sporkin)

AMERICAN LIBRARY ASSOCIATION, *et al.*,
Plaintiffs,

v.

WILLIAM BARR, Attorney General of the United States, *et al.*,
Defendants.

ORDER

Upon consideration of Plaintiffs' and Defendants' Cross Motions for Summary Judgment, oral argument, and the entire record herein, it is hereby

ORDERED that the Plaintiffs' Motion for Summary Judgment is GRANTED and it is

FURTHER ORDERED that the Defendants' Motion for Summary Judgment is DENIED and it is

DECLARED that the record-keeping and labeling provisions of the Child Protection Restoration and Penalties Enforcement Act of 1990 as applied to producers and distributors of any material that contains depictions of people under 18 years of age is CONSTITUTIONAL and it is

DECLARED that the record-keeping and labeling provisions of the Child Protection Restoration and Penalties Enforcement Act of 1990 as applied to producers and distributors of any material who have satisfied themselves

after due diligence that such material does not contain depictions of people under 18 years of age is UNCONSTITUTIONAL and it is

FURTHER ORDERED that Defendants are enjoined from enforcing the record-keeping and labeling provisions of the Child Protection Restoration and Penalties Enforcement Act of 1990 with respect to producers and distributors of any material who have satisfied themselves after due diligence that such material does not contain depictions of people under 18 years of age.

DATE: 5/26/92

/s/ Stanley Sporkin
STANLEY SPORKIN
United States District Court

APPENDIX C

[Filed Feb. 28, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-5271

AMERICAN LIBRARY ASSOCIATION, on their own behalf and on behalf of their members,
Appellees,

v.

WILLIAM BARR, Attorney General of the United States, JANET RENO, Attorney General of the United States, Department of Justice,
Appellants

BEFORE: Buckley and Williams, Circuit Judges, and John W. Reynolds,* Senior District Judge

ORDER

Upon consideration of appellees' petition for rehearing and of the response thereto, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

RON GARVIN
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

---

* Senior District Judge Reynolds would grant the Petition for Rehearing.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Issued February 28, 1995

No. 92-5271

AMERICAN LIBRARY ASSOCIATION, ET AL.,
Appellees

v.

JANET RENO, Attorney General of the United States;
Department of Justice,
Appellants

Appeal from the United States District Court
for the District of Columbia
(No. 91cv00394)

On Appellees' Suggestion For Rehearing *In Banc*

Before: EDWARDS, *Chief Judge*; WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS and TATEL, *Circuit Judges.*

ORDER

Appellees' Suggestion For Rehearing *In Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a major-

ity of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the court *in banc*, that the suggestion is denied.

Per Curiam

For the Court:

RON GARVIN
Clerk

Circuit Judges WALD and TATEL would grant the suggestion.

A statement of *Circuit Judge* TATEL, joined by *Circuit Judge* WALD, dissenting from the denial of rehearing *in banc*, is attached.

TATEL, *Circuit Judge*, with whom WALD, *Circuit Judge*, joins, dissenting from the denial of the suggestion for rehearing *in banc*: The statute and regulations sustained by the panel require every "producer," from photographers to printers to page layout artists, to maintain copies of photo IDs of every performer, regardless of age, who is "visually depicted" engaging in "actual sexually explicit conduct." *See* 18 U.S.C. § 2257(a) & (b) (1988 & Supp. V 1993); 28 C.F.R. § 75.2 (1994). These records must be cross-indexed by every name that the performer has ever used, and by every work in which the depictions appear. 18 U.S.C. § 2257(b); 28 C.F.R. § 75.3. Every book, magazine, photograph, videotape or movie containing such depictions must have affixed to it, in a prominent place, a label disclosing the name and address of the individual who maintains the records. 18 U.S.C. § 2257(e); 28 C.F.R. § 75.6, § 75.8. A violation of these record-keeping requirements is a felony. A first offense is punishable by a fine and up to two years in prison; a second offense may result in up to five years in prison. 18 U.S.C. § 2257(i).

The stated purpose of these record-keeping requirements—furthering the prosecution of child pornographers—is compelling. As applied to these petitioners, however, the statute's burdens on speech may well be too great and its effects too tenuous for it to be constitutional. Even if it is content-neutral—a point of which I am not convinced—there is a serious risk that it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

To begin with, I doubt that the statute can accomplish its purpose. At best, it may deter some older-looking teens who are under eighteen from modelling for sexually explicit material, and prevent some producers from mistakenly using under-age teens as models. The record, however, is devoid of any evidence indicating how exten-

sive these effects will be. The statute may not deter older minors, for example, since they can circumvent it by procuring fake IDs. Producers who knowingly use minors in sexually explicit materials are already subject to criminal penalties. This statute will not help prosecute them, since these records may not be used as evidence "with respect to any violation of law" except the record-keeping statute itself. 18 U.S.C. § 2257(d). The only class of producers whose behavior this statute is likely to influence—those who ignore the age of their models but would nonetheless refuse to employ individuals they knew were minors—could be equally deterred, with no corresponding regulatory burden on protected speech, by rewriting the child pornography statutes to impose criminal liability upon those who recklessly or negligently violate them. *See United States v. U.S. District Court*, 858 F.2d 534, 542-43 (9th Cir. 1988) (reading such a requirement into 18 U.S.C. § 2251(a), which bars the production of child pornography); *cf. United States v. X-Citement Video*, 115 S. Ct. 464 (1994) (reading into 18 U.S.C. § 2252, which bars the distribution of child pornography, a requirement that the distributor know that the material includes minors). While such an approach might allow a few individuals to escape liability by establishing that they had made a reasonable mistake about the age of the model, "even as compelling a societal interest as the protection of minors must occasionally yield to specific constitutional guarantees." *United States v. U.S. District Court*, 858 F.2d at 543.

Not only is the statute thus unlikely to accomplish its otherwise compelling objective, but whatever marginal deterrence the statute achieves may well be overshadowed by its unprecedented imposition of a permanent and pervasive regulatory burden on a single class of speakers. All those who include sexually explicit material in their work will be affected, including some of society's most biting commentators on sex and sexuality. While many

people may find speech depicting "actual sexually explicit conduct" offensive, and while some may welcome anything that limits its production, the vast majority of such speech is nonetheless protected by the First Amendment. *See id.*, 858 F.2d at 541-42 (noting that non-obscene pornography is fully protected by the First Amendment, and that no majority of the Supreme Court has ever supported a contrary holding). This statute imposes upon speakers a difficult dilemma: either comply at great cost of time, money and effort or risk the penalty of up to five years in prison. Either way, its impact on protected speech could be significant.

Petitioners' filings in the district court reflect that in addition to being deterred by the burdens imposed by this statute, speakers engaging in protected speech will be muffled in other ways. By requiring these often controversial artists to reveal their studio or home addresses on the face of their work, for example, the statute subjects them to the risk of harassment and physical threat. Petitioners also point out that the statute may further impede the work of artists and producers when adult models—whose depiction does not violate any law—nonetheless refuse to participate because they do not want their names, photos, addresses or histories associated with their sexually explicit work. Such an association is quite likely to occur, since the records created under the statute will be available not only to the primary producers, but to secondary producers, law enforcement officers, and perhaps others as well. In the end, the greatest effect of this statute may thus well be to restrict not child pornography, but rather the flow of protected speech into the hands of galleries, stores, libraries, artists, and every adult who desires to see or hear it.

Like so many other First Amendment cases that deal with speech on the borders of social acceptability, this case is not just about pornography. It is about all speech. If we ignore our First Amendment guarantees in the face

of words and thoughts that are unpopular, unconventional, or even detestable, we create precedents that may later be used to silence the speech we value.

The District Court found this statute unconstitutional, and the panel which reversed that decision was itself split. Considering the scale of the statutory requirements and their certain effect upon some protected speech. this case is of exceptional importance and warrants *in banc* review. I respectfully dissent from the court's deniel of the suggestion for rehearing *in banc*.

APPENDIX E

[Filed Mar. 17, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-5271

AMERICAN LIBRARY ASSOCIATION, *et al.*,
Appellees,

v.

JANET RENO, *et al.*,
Attorney General of the United States,
Appellants.

BEFORE: Buckley and Williams, Circuit Judges, and Reynolds,* Senior District Judge for the Eastern District of Wisconsin

ORDER

Upon consideration of appellees' motion to stay issuance of mandate, the response thereto and of the reply, it is

ORDERED, by the Court, that the Clerk is directed to withhold issuance of the mandate of the court through April 7, 1995.

Per Curiam
FOR THE COURT:

By: /s/ Linda Jones
for ROBERT A. BONNER
Deputy Clerk

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX F

18 U.S.C. § 2257

§ 2257. Record keeping requirements

(a) Whoever produces any book, magazine, periodical, film, videotape, or other matter which—

(1) contains one or more visual depictions made after November 1, 1990 of actual sexually explicit conduct; and

(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct—

(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his busi-

ness premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

(d)(1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

(2) Paragraph (1) of this subsection shall not preclude the use of such information or evidence in a prosecution or other action for a violation of this section or for a violation of any applicable provision of law with respect to the furnishing of false information.

(e)(1) Any person to whom subsection (a) applies shall cause to be affixed to every copy of any matter described in paragraph (1) of subsection (a) of this section, in such manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located.

(2) If the person to whom subsection (a) of this section applies is an organization the statement required by this subsection shall include the name, title, and business address of the individual employed by such organization responsible for maintaining the records required by this section.

(f)[1] it shall be unlawful—

(1) for any person to whom subsection (a) applies to fail to create or maintain the records as required by subsections (a) and (c) or by any regulation promulgated under this section;

(2) for any person to whom subsection (a) applies knowingly to make any false entry in or know-

ingly to fail to make an appropriate entry in, any record required by subsection (b) of this section or any regulation promulgated under this section;

(3) for any person to whom subsection (a) applies knowingly to fail to comply with the provisions of subsection (e) or any regulation promulgated pursuant to that subsection; and

(4) for any person knowingly to sell or otherwise transfer, or offer for sale or transfer, any book, magazine, periodical, film, video, or other matter, produce in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce or which is intended for shipment in interstate or foreign commerce, which—

(A) contains one or more visual depictions made after the effective date of this subsection of actual sexually explicit conduct; and

(B) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

which does not have affixed thereto, in a manner prescribed as set forth in subsection (e)(1), a statement describing where the records required by this section may be located, but such person shall have no duty to determine the accuracy of the contents of the statement or the records required to be kept.

(g)[1] The Attorney General shall issue appropriate regulations to carry out this section.

(h) As used in this this section—

(1) the term "actual sexually explicit conduct" means actual but not simulated conduct as defined

[1] So in original.

in subparagraphs (A) through (D) of paragraph (2) of section 2256 of this title;

(2) "identification document" has the meaning given that term in section 1028(d) of this title;

(3) the term "produces" means to produce, manufacture, or publish any book, magazine, periodical, film, video tape or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but does not include mere distribution or any other activity which does not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted; and

(4) the term "performer" includes any person portrayed in a visual depiction engaging in, or assisting another person to engage in, actual sexually explicit conduct.

(i) Whoever violates this section shall be imprisoned for not more than 2 years, and fined in accordance with the provisions of this title, or both. Whoever violates this section after having been convicted of a violation punishable under this section shall be imprisoned for any period of years not more than 5 years but not less than 2 years, and fined in accordance with the provisions of this title, or both.

(f) [1] The Attorney General shall issue appropriate regulations to carry out this section.

(g) [1] As used in this section—

(1) the term "actual sexually explicit conduct" means actual but not simulated conduct as defined in subparagraphs (A) through (E) of paragraph (2) of section 2256 of this title;

(2) "identification document" has the meaning given that term in subsection 1028(d) of this title;

(3) the term "produces" means to produce, manufacture, or publish and includes the duplication, reproduction, or reissuing of any material; and

(4) the term "performer" includes any person portrayed in a visual depiction engaging in, or assisting another person to engage in, actual sexually explicit conduct.

(Added Pub.L. 100-690, Title VII, § 7513(a), Nov. 18, 1988, 102 Stat. 4487, and amended Pub.L. 101-647, Title III, §§ 301(b), 311, Nov. 29, 1990, 104 Stat. 4808.)

APPENDIX G

28 C.F.R. Ch. 1, Part 75

PART 75—CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990; RECORD-KEEPING PROVISIONS

Sec.

75.1 Definitions.
75.2 Maintenance of records.
75.3 Categorization of records.
75.4 Location of records.
75.5 Inspection of records.
75.6 Statement describing location of books and records.
75.7 Exemption statement.
75.8 Location of the statement.

AUTHORITY: 18 U.S.C. 2257.

SOURCE: ORDER No. 1586-92, 57 FR 15021, Apr. 24, 1992, unless otherwise noted.

§ 75.1 Definitions.

(a) Terms used in this part shall have the meanings set forth in 18 U.S.C. 2257.

(b) *Picture identification card* shall mean a document issued by a government entity or by a private entity, such as a school or a private employer, that bears the photograph and the name of the individual identified. A picture identification card may be a passport, driver's license, work identification card, school identification card, selective service card, or identification card issued by a state.

(c) *Producer* means any person, including any individual, corporation, or other organization, who is a *primary producer* or a *secondary producer*.

(1) A *primary producer* is any person who actually films, videotapes, or photographs a visual depiction of actual sexually explicit conduct.

(2) A *secondary producer* is any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, or other matter intended for commercial distribution that contains a visual depiction of actual sexually explicit conduct.

(3) The same person may be both a primary and a secondary producer.

(4) *Producer* does not include persons whose activities relating to the visual depiction of actual sexually explicit conduct are limited to the following:

(i) Photo processing;

(ii) Distribution; or

(iii) Any activity, other than those activities identified in paragraphs (c) (1) and (2) of this section, that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers.

(d) *Sell*, *distribute*, *redistribute*, and *rerelease* refer to commercial distribution of a book, magazine, periodical, film, videotape, or other matter that contains a visual depiction of actual sexually explicit conduct, and does not refer to noncommercial distribution of the such matter, including transfers conducted by lending libraries.

(e) *Copy*, when used in reference to an identification document or a picture identification card, means a photocopy or a photograph.

§ 75.2 Maintenance of records.

(a) Any producer of any book, magazine, periodical, film, videotape, or other matter that contains one or more visual depictions of actual sexually explicit conduct made

after November 1, 1990 shall, for each performer portrayed in such visual depiction, create and maintain records containing the following:

(1) The legal name and date of birth of each performer, obtained by the producer's examination of an identification document, as defined by 18 U.S.C. 1028 (d). For any performer portrayed in such a depiction made after May 26, 1992, the records shall also include a legible copy of the identification document examined and, if that document does not contain a recent and recognizable picture of the performer, a legible copy of a picture identification card.

(2) Any name, other than each performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name. For any performer portrayed in such a depiction made after May 26, 1992, such names shall be indexed by the title or identifying number of the book, magazine, film, videotape, or other matter.

(b) A producer who is a secondary producer as defined in § 75.1(c) may satisfy the requirements of this Part to create and maintain records by accepting from the primary producer, as defined in § 75.1(c), copies of the records described in paragraph (a) of this section. Such a secondary producer shall also keep records of the name and address of the primary producer from whom he received copies of the records.

(c) The information contained in the records required to be created and maintained by this part need be current only as of the time the primary producer actually films, videotapes, or photographs the visual depiction of actual sexually explicit conduct. If the producer subsequently produces an additional book, magazine, film, videotape or other matter that contains one or more visual depictions of actual sexually explicit conduct made by a performer for whom he maintains records as required by this part, the producer may add the additional

title and/or identifying number and the names of the performer to the existing records maintained pursuant to § 75.2(a)(2).

§ 75.3 Categorization of records.

Records required to be maintained under this part shall be categorized and retrievable to: All name(s) of each performer, including any alias, maiden name, nickname, stage name or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, or other matter. Only one copy of each picture of a performer's picture identification card and identification document must be kept as long as each copy is categorized and retrievable according to any name, real or assumed, used by such performer, and according to any title or other identifier of the matter.

§ 75.4 Location of records.

Any producer required by this part to maintain records shall make such records available at the producer's place of business. The business address shall refer to a street address and not to a post office box number. Such records shall be maintained as long as the producer remains in business. If the producer ceases to carry on the business, the records shall be maintained for five years thereafter. If the producer produces the book, magazine, periodical, film, videotape or other matter as part of his control of or through his employment with an organization, records shall be made available at the organization's place of business. If the organization is dissolved, the individual who was responsible for maintaining the records on behalf of the organization, as described in § 75.6(b), shall continue to maintain the records for a period of five years after dissolution.

§ 75.5 Inspection of records.

Any producer required by this part to maintain records shall make such records available to the Attorney General or his delegee for inspection at all reasonable times.

§ 75.6 Statement describing location of books and records.

Any producer of any book, magazine, periodical, film, videotape, or other matter that contains one or more visual depictions of actual sexual explicit conduct made after November 1, 1990, and produced, manufactured, published, duplicated, reproduced, or reissued on or after May 26, 1992 shall cause to be affixed to every copy of the matter a statement describing the location of the records required by this part. A producer may cause such statement to be affixed, for example, by instructing the manufacturer of the book, magazine, periodical, film, videotape, or other matter to affix the statement.

(a) Every statement shall contain:

(1) The title of the book, magazine, periodical, film, or videotape, or other matter (unless the title is prominently set out elsewhere in the book, magazine, periodical, film, or videotape, or other matter), or, if there is no title, an identifying number or similar identifier which differentiates this matter from other matters which the producer has produced;

(2) The date of production, manufacture, publication, duplication, reproduction, or reissuance of the matter; and,

(3) A street address at which the records required by this part may be made available. The street address may be an address specified by the primary producer or, if the secondary producer satisfies the requirements of § 75.2(b), the address of the secondary producer.

(b) If the producer is an organization, the statement shall also contain the name, title, and business address of the individual employed by such organization who is responsible for maintaining the records required by this part.

(c) The information contained in the statement must be accurate as of the date on which the book, magazine,

periodical, film, videotape, or other matter is sold, distributed, redistributed, or rereleased.

§ 75.7 Exemption statement.

(a) Any producer of any book, magazine, periodical, film, videotape, or other matter may cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requirements of 18 U.S.C. 2257(a)-(c) and of this part if:

(1) The matter contains only visual depictions of actual sexually explicit conduct made before November 1, 1990, or is produced, manufactured, published, duplicated, reproduced or reissued before May 26, 1992;

(2) The matter contains only visual depictions of simulated sexually explicit conduct; or,

(3) The matter contains only some combination of the visual depictions described in paragraphs (a)(1) and (a)(2) of this section.

(b) If the primary producer and the secondary producer are different entities, the primary producer may certify to the secondary producer that the visual depictions in the matter satisfy the standards under paragraphs (a)(1) through (a)(3) of this section. The secondary producer may then cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requiremens of 18 U.S.C. 2257(a)-(c) and of this part.

§ 75.8 Location of the statement.

All books, magazines, and periodicals shall contain the statement required in § 75.6 or suggested in § 75.7 either on the first page that appears after the front cover or on the page on which copyright information appears. In any film or videotape which contains end credits for the production, direction, distribution, or other activity in connection with the film or videotape, the statement

referred to in § 75.6 or § 75.7 shall be presented at the end of the end titles or final credits and shall be displayed for a sufficient duration to be capable of being read by the average viewer. Any other film or videotape shall contain the required statement within one minute from the start of the film or videotape, and before the opening scene, and shall display the statement for a sufficient duration to be read by the average viewer. For all other categories not otherwise mentioned in this section, the statement is to be prominently displayed consistent with the manner of display required for the aforementioned categories.

SUPREME COURT, U.S.
FILED
MAY 26 1995
OFFICE OF THE CLERK

(2)

No. 94-1653

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE AMERICAN LIBRARY ASSOCIATION, et al.
Petitioners,

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; DEPARTMENT OF JUSTICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL FAMILY LEGAL FOUNDATION, FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Len L. Munsil
National Family Legal Foundation
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Counsel for Amici Curiae

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CONSENT OF THE PARTIES

Attorneys for Petitioners and Respondent have consented to the filing of an amici curiae brief by National Family Legal Foundation, Focus on the Family, and Family Research Council, Inc. (Appendix A).

INTEREST OF AMICI CURIAE

National Family Legal Foundation ("NFLF") is a non-profit legal organization founded in 1990. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. NFLF provides public information on legal and social issues related to pornography, and on sexual exploitation and victimization by child pornographers. The Foundation has a legal staff of attorneys practicing exclusively in the First Amendment/pornography area.

NFLF's former Executive Director, Alan E. Sears, was also the Executive Director of the Attorney General's Commission on Pornography. Mr. Sears and the Honorable Edwin Meese, who as Attorney General issued the commission's Final Report, now serve on NFLF's Board of Directors.

The recordkeeping provisions of the Child Protection Restoration and Penalties Enhancement Act were the direct result of a key recommendation of the Attorney General's Commission. Mr. Sears was involved in drafting the legislation and submitted comments for NFLF and other groups on the Act's accompanying regulations. NFLF attorney Len Munsil has written an amicus brief at every level of proceedings beginning with the U.S. District Court case.

Focus on the Family is a Christian, non-profit organization committed to strengthening the emotional, psychological and spiritual health of children and their

families in the United States and throughout the world. Focus President Dr. James C. Dobson, a renowned child psychologist, served on the Attorney General's Commission on Pornography in 1986.

Focus has produced two major videos, "A Winnable War" and "Fatal Addiction" and assisted in one book *Pornography: A Human Tragedy* which directly discusses the harms of pornography to children, men, women and families in America. The videos and book have been seen and read by thousands of concerned citizens nationwide. Focus' daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1,400 stations. Its monthly magazine has a circulation of 1.85 million. Focus regularly receives letters and telephone calls from and counsels with families who have children devastated by pornography, molestation and abuse.

Focus on the Family works to preserve and protect

the family, and thus has particular knowledge about the impact of child pornography that will be helpful to the Court in this case.

Family Research Council, Inc. is a voice for the pro-family movement in Washington, D.C. and provides policy analysis, legislative assistance and research for pro-family organizations. It also seeks to educate legislators on issues which affect American families. Its research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens.

The issues in this case directly affect the physical, psychological and emotional well being of children, parents and communities throughout the United States. Family Research Council, Inc. works through legislative assistance and public policy to preserve and protect the family and thus has particular knowledge about the harms of child pornography that will be helpful to the Court in this case.

SUMMARY OF ARGUMENT

The Child Protection Restoration and Penalties Enhancement Act of 1990, codified at 18 U.S.C. § 2257 ("the Act"), requires producers of material containing "actual sexually explicit conduct" to create and maintain records concerning the age and true identity of the "performers" depicted. Those who produce such material for commercial gain must affix a statement to the material that gives the location of the records maintained pursuant to the Act. The Act prohibits no speech, and nothing learned through the Act's requirements can be used in a subsequent obscenity or child pornography trial. The Act is designed simply to prevent producers of hard-core pornography from using children as "performers."

The Act serves a governmental interest of the highest priority -- protecting children from being used in hard-core pornography -- by placing reasonable restrictions on the "manner" in which material with "actual sexually

explicit conduct" is displayed. These minimal restrictions are narrowly tailored to serve that interest, and will in no way interfere with or "chill" important free speech rights.

ARGUMENT

Throughout their brief, Petitioners carefully avoid detailed discussion of the type of material regulated by the Act. Instead they euphemistically write about burdens on "expression that is fully protected by the First Amendment." (Petitioners' Brief at 7). In a revealing omission, nowhere in their argument do Petitioners bother to tell the Court what type of important, significant and "fully protected" depictions are affected by the Act. We thought we could help by quoting from the Act's definition of "actual sexually explicit conduct":

> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse.

18 U.S.C. §2256 (2)(A-D).

We're not talking about Leonardo da Vinci or Michelangelo here. We're talking about producers of hard-core pornography, who hire prostitutes to perform sex acts in front of a camera. That is the "important" and "artistic" speech Petitioners are so concerned about but never bother to define.[1]

Nothing in the mainstream media depicts "actual sexually explicit conduct" as defined by the statute.[2] Any

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[1] Particularly amusing is Petitioners' hand wringing over the Act's effect on "a significant genre of art: appropriationist artwork that incorporates images of actual sexually explicit conduct created by others." (Petitioners' brief at 6). No doubt many art critics would be perplexed by the contention that stealing someone else's photo of people having sex and using it in your own "art" is "a significant genre."

[2] Amici continue to believe that all of the Petitioners lack standing based on the allegations contained in their complaint. The district court and appeals court gave this issue cursory review, and the government appears to have abandoned it. Nevertheless, we believe none of the Petitioners demonstrated that they would be injured or even affected by the Act. They did demonstrate their concern over the issue, "but standing is not measured by the intensity of the litigant's interest or the fervor of his

material that contains "actual sexually explicit conduct," if

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advocacy." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 486 (1982).

The hard-core pornography industry, which does produce material that will be regulated by this Act, is not represented in this lawsuit. That may be because "adult" video and magazine corporations are frequently shadowy organizations with documented ties to organized crime figures. See Final Report, Attorney General's Commission on Pornography (A.G.C.P.), Vol II at 1037 (July 1986). Unquestionably, as plaintiffs in a major lawsuit they would not be nearly as attractive as legitimate library organizations, periodicals distributors, artists and photographers. Further, unlike existing Petitioners, the adult magazine and video industry is notorious for its emphasis on youth, which often involves using post-pubescent teenage children in hard-core pornographic movies and photographs. The case of Traci Lords, who was molested in more than 100 hard-core pornographic movies before her 17th birthday, is not atypical. It is that type of case that this Act is designed to prevent.

Libraries, freedom to read organizations, legitimate periodical distributors, artists and photographers are not affected by this Act at all, yet they are the plaintiffs. The adult video and magazine industry, which will be regulated, is noticeably absent. We think it is a bad precedent to allow legitimate organizations with extreme First Amendment views to serve as "front groups" for illegitimate, organized-crime controlled enterprises that create illegal obscene material.

it is not in fact obscene and therefore unprotected by the First Amendment, will lie at the outer edge of what the First Amendment protects. This Court has indicated on several occasions that non-obscene, sexually explicit speech is simply not on the same plane of First Amendment protection as political discourse or other forms of speech. See e.g. *Barnes v. Glen Theatre*, 111 S.Ct. 2456 (1991) (nude dancing is "marginally" expressive conduct "within the outer perimeters of the First Amendment"); *Young v. American Mini-Theatres*, 427 U.S. 50 (1967) (plurality opinion) (society's interest in protecting sexual speech lesser than interest in protecting political speech; viewing "Specified Sexual Activities" is not a right Americans would be willing to go to war to preserve).

It is also worth noting that the definition of obscenity is in some respects broader than the definition of "actual sexually explicit conduct" contained in the Act. For matter to be obscene, it needs to meet the three-part test set

forth in *Miller v. California*, 413 U.S. 15 (1973): it must depict sex in a patently offensive way; be intended to appeal to the prurient interest; and lack serious value. But the sex depicted in obscene material need not be "actual sexually explicit conduct" -- simulated sexual activity can render material obscene if other parts of the test are met. Thus, the Act is limited to regulating only material that contains depictions that are the most explicit type of hard-core pornography under the test for obscenity, and obscenity is completely without protection of the First Amendment. The close relationship between material containing "actual sexually explicit conduct" and material that crosses the line into unprotected obscenity or child pornography should be considered when examining the claim that "self-censorship" will be caused by the Act's "chilling effect" on speech. As this Court stated in *Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989), "[t]he mere assertion of some possible self-censorship resulting from a statute is not enough to render

an anti-obscenity law unconstitutional under our precedents." Or as the Ninth Circuit put it in upholding Arizona's stiff fines for obscenity violations:

> Whatever chill may arise from Arizona's felony fine system, properly understood, is attributable to the state's legitimate deterrent goal ... Those who conduct their affairs close to the boundary of proscribed activity necessarily incur some risks.

Polykoff v. Collins, 816 F.2d 1326, 1340 (9th Cir. 1987).

Anyone who is involved in disseminating material containing depictions of "actual sexually explicit conduct" is already walking the line between speech and illegal obscenity. They are also walking the line between speech and unprotected child pornography, in that the legality of the material turns solely on the age of the "performers." The Act merely requires that, if they choose to walk that line and disseminate such material, they keep records of the age of the "performers." That may actually assist them in avoiding violation of child pornography laws.

The "speech" regulated by the Act is deserving of

only marginal First Amendment protection to begin with, so this Court need not examine the burdens the Act imposes with heightened First Amendment scrutiny. To the extent the Act regulates speech, the requirement that producers keep certain records of employees, and that the location of those records be attached to the material, is a regulation of the "manner" of expression. To pass constitutional muster under a "time, place and manner" analysis, the Act must: 1) be content-neutral; 2) be narrowly tailored to serve a significant governmental interest; and 3) leave open ample alternative avenues of communication. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 298 n.5 (1984). The Act easily meets those requirements. As the D.C. Circuit concluded, it is not concerned with the content or message of any sexually explicit material. Instead, it is narrowly tailored to serve the government's compelling interest in protecting children from being used in hard-core pornography. And it does more than allow ample

alternative avenues of communication, it does not even interfere with the very avenue of communication it regulates.

Because it regulates conduct, the Act should be analyzed under the four-part *O'Brien* test for determining the constitutionality of regulations of conduct which have the incidental effect of burdening protected expression. The Act is not aimed at regulating speech but at conduct -- the hiring of performers to engage in "actual sexually explicit conduct" in front of cameras. Under *United States v. O'Brien*, 391 U.S. 367 (1967), a regulation is justified despite its impact on First Amendment interests if:

1) it is within the constitutional power of government;

2) it furthers an important or substantial governmental interest;

3) the governmental interest is unrelated to the suppression of free expression; and

4) the incidental restriction on First Amendment freedoms is not greater than is essential to

the furtherance of that interest.

The Act is manifestly within the power of the government, which requires employers to keep a host of other personnel records for purposes much less compelling than the protection of children from being used in hard-core pornography.

The protection of children from the abuse caused by their molestation in sexually explicit photos or films is a governmental interest of "surpassing importance." In *Ferber v. New York*, 458 U.S. 747 (1982), this Court held that child pornography, even though not obscene under the *Miller* standard, is outside the protection of the First Amendment. The Court supported its conclusion with a lengthy discussion of the harms to children when their bodies are used to sell pornography.

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." "A democratic society rests, for its continuance, upon the

> healthy, well-rounded growth of young people into full maturity as citizens." ... The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.

Ferber, 458 U.S. at 756-57 (citations omitted). The Court went on to cite a number of studies supporting the legislative judgment that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child. That judgment, we think, easily passes muster under the First Amendment." 458 U.S. at 759.

The Court then discussed some of the particular horrors faced by children used in hard-core pornography, noting that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." In a footnote the Court cited "one authority" who wrote that:

> [P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are

> reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.

Ferber, 458 U.S. 759, n.10.

The children sought to be protected here are post-pubescent children who look like adults. The record-keeping requirements contained in the Act are derived primarily from Recommendation 37 of the Attorney General's Commission on Pornography. See A.G.C.P. Vol. I at 618. The Commission found justification for the requirements after a careful study of the "performers" or "models" used in hard-core pornographic films and magazines:

> Perhaps the single most common feature of models is their relative, and in the vast majority of cases, absolute youth. As one law enforcement officer who has extensively investigated the production of commercial pornography told us, "they [the producers] are looking for models that look as young as possible. They may use an 18-year-old

> model and dress her up to look like she is 15." Female models appearing in "mainstream" commercial pornography appear rarely to be over thirty years old or even in their late twenties; indeed, most whose age we have been able to gauge began their careers in their late teens. Indeed, one former model who now works in the front office of an "adult" video company explained her decision to retire thus: "Good roles for women over nineteen years old have become few and far between." William Margold, a leading figure in the "adult" film industry, described it simply as "essentially an overage juvenile hall."

A.G.C.P. at 855-56 (citations omitted).

Given these factual findings, the Commission noted an increased demand for both child pornography and pseudo-child pornography, which uses young adults dressed like children. This frequently led to problems in enforcing the pre-1988 laws against child pornography:

> The growth of pseudo child pornography has made it increasingly difficult for law enforcement officers to ascertain whether an individual in a film or other visual depictions is a minor... experts and law enforcement officers have found it difficult to extend [full protection of child pornography laws]

> because in many instances, ascertaining the real ages of adolescent performers is impossible. By viewing a visual depiction, how does one decide if the performer is fourteen or eighteen, seventeen or twenty-one?

A.G.C.P. at 618, 620 (emphasis added).

The Commission found that child pornography laws were not being enforced effectively because the youthfulness of all performers in hard-core pornography made it difficult to determine whether minors were used in any particular film, video or magazine. Clearly, minors have been and are being used in the mainstream commercial pornography industry.[3] These findings of the Commission

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[3] For one well-publicized example, see *U.S. v. Kantor*, 677 F.Supp. 1421 (C.D. Cal. 1987), involving hard-core porn "superstar" Traci Lords, who made more than 100 films depicting actual sexual intercourse and numerous other sexual acts that were distributed internationally in pornographic outlets and video stores over the course of several years. In 1986, it was discovered that she was 17 years old, and that she had begun her hard-core career at age 15. Interestingly, several of those hard-core films trumpeted the fact that Lords was playing a "schoolgirl" role, highlighting the porn industry's desire to play up the

led directly to its recommendation that producers and distributors be required to keep records on performers.

The third prong of the *O'Brien* test is whether the governmental interest is unrelated to the suppression of free expression. There is no evidence in the legislative record that Congress intended by this legislation to do anything other than prevent children from being used in hard-core pornography.[4] Because child pornography is not free

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youth of its performers. More recently, the same scenario occurred involving another porn star, Alexandria Quinn, who made more than 60 hard-core videos before it was discovered that she was a child. Her later appearance on a TV news show was marked by remorse, tears, and shame -- the reactions of a teenager who is beginning to recognize that she has been used.

[4] This Court has upheld other governmental regulations as content-neutral even though they impacted sexually oriented speech businesses. See *Arcara v. Cloud Books*, 478 U.S. 697 (1986) (closure of "adult" bookstore based on illegal activity occurring on premises proper despite impact on presumptively protected speech); *Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (adult use zoning ordinance regulating sexually oriented businesses constitutional because it is content-neutral; aimed at preventing blight, not at suppressing speech even though it

speech, and because nonobscene material is merely regulated and not prohibited by the Act, the recordkeeping provisions pass this part of the *O'Brien* test.

The final prong of the test is whether the incidental restrictions on speech are no greater than necessary to effectuate the government's purpose. In light of the government regulations governing the Act's implementation, it is clear the burdens imposed by the Act on marginally protected speech interests are minimal, and are essential to furthering the government's compelling interest in protecting children from being used in hard-core pornography.

The record-keeping requirements of the Act are not unduly burdensome to First Amendment free speech rights. A number of federal laws contain similar requirements, as noted in the Final Report of the Attorney General's

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incidentally impacts speech).

Commission on Pornography. "The proposed legislation would serve a recordkeeping purpose comparable to that found in environmental and similar statutes." A.G.C.P. at 621-22 (citing at n.469 "The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)).[5] The Commission in making this recommendation relied on testimony from a number of expert witnesses, including noted civil libertarians like Harvard Law School Professor Alan Dershowitz, a regular contributor to Penthouse magazine, who at the time of his testimony was representing Penthouse, now a plaintiff in this suit:

> My own personal view is that every magazine should be required to get consent forms of models who do participate in this kind of activity and I for one...would be in favor of legislation that would require that if photographs are taken in the United States of America of American people, that consent forms should be required. That, it seems to

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[5] 7 U.S.C. § 1361. See also 8 U.S.C. § 1324 (federal immigration law) and 26 U.S.C. § 4421 et seq. (Internal Revenue Code requirements for illegal wagering.)

> me, is not an issue in the law of pornography, it is an issue on the law of voluntariness and consent... I think consent is a very important part of freedom, and Commissioners, on this one I think you and I agree, we all want to increase volunteerism and decrease lack of consent, whether that be by models or purchasers of magazines.

Transcript of Hearing, A.G.C.P., Jan. 21-22 (1986) (emphasis added).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), a number of candidates for political office, officeholders and political organizations challenged provision of the Federal Election Campaign Act of 1971 (F.E.C.A.), including its extensive disclosure requirements for campaign contributors. After a detailed discussion of the important First Amendment rights of speech and association implicated by the disclosure requirements, and an acknowledgement that those rights could be significantly impaired by the statute, this Court upheld the law as constitutional because it furthered important governmental interests. This Court ruled that "the

substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged." 424 U.S. at 72.

F.E.C.A. regulated speech at the core of protections provided by the First Amendment -- pure political speech, in the form of campaign contributions to political candidates. The disclosure requirements are substantially more burdensome to the free speech rights of political organizations than the record-keeping requirements of the Act are to producers and distributors of material depicting "actual sexually explicit conduct." After *Buckley*, it should be clear that these record-keeping requirements involving pornographic speech are a fortiori constitutional.

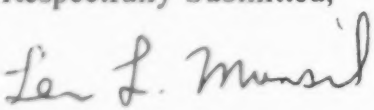
Anything short of the Act's requirement that producers of material that depicts people performing "actual sexually explicit conduct" keep identification and age records will not serve the compelling governmental interest of protecting children from use in hard-core pornography.

The Traci Lords and Alexandria Quinn cases, which together account for at least 160 videos sold in the mainstream adult market that turned out to be child pornography, prove that real children will be injured without a recordkeeping requirement. If this Act does not stand, real children will be sexually abused and exploited by pornographers who are all too willing to put profits before principle by using post-pubescent minor teenagers.

CONCLUSION

For all of the foregoing reasons, amici curiae National Family Legal Foundation, Focus on the Family, and Family Research Council, Inc. respectfully urge this court to deny the Petition for Writ of Certiorari.

Respectfully Submitted,



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APPENDIX "A"

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

May 16, 1995

Len L. Munsil
Executive Director and
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National Family Legal Foundation
5353 North 16th Street
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Re: ALA v. Reno
No. 94-1653

Dear Mr. Munsil:

As requested in your letter of May 2, 1995, I hereby consent to the filing of a brief amicus curiae in opposition to the petition for writ of certiorari in the above-styled case, by the National Family Legal Foundation, Focus on the Family and Family Research Council.

Sincerely,

Drew S. Days, III

Drew S. Days, III
Solicitor General

cc: William K. Suter, Esquire
Clerk
Supreme Court of the United States
Washington, D.C. 20543

BEST AVAILABLE COPY

I, Bruce J. Ennis, Jr., do hereby consent to the filing of an Amicus Curiae Brief in opposition to the Petition for Writ of Certiorari in *ALA v. Reno*, No. 94-1653, by the National Family Legal Foundation, Focus on the Family and Family Research Council.

5/8/95
Date

Bruce J. Ennis, Jr. /BJE
Bruce J. Ennis, Jr.
Counsel for Petitioners

I, Bruce J. Ennis, Jr., do not consent to the filing of an Amicus Curiae Brief in opposition to the Petition for Writ of Certiorari in *ALA v. Reno*, No. 94-1653, by the National Family Legal Foundation, Focus on the Family and Family Research Council.

Date

Bruce J. Ennis, Jr.
Counsel for Petitioners

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CERTIFICATE OF SERVICE

Two copies of the foregoing Brief Amici Curiae were deposited in the United States Mail, First Class, Postage Prepaid on this 26th day of May, 1995, to each of the following attorneys:

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(3)

No. 94-1653

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In the Supreme Court of the United States

OCTOBER TERM, 1994

THE AMERICAN LIBRARY ASSOCIATION, ET AL.,
PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 2257, which requires producers of material depicting sexually explicit acts to create and maintain records of the names and ages of the persons portrayed as a means of deterring the production and distribution of child pornography, comports with the First Amendment.

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No. 94-1653

THE AMERICAN LIBRARY ASSOCIATION, ET AL., PETITIONERS

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JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 33 F.3d 78. The opinion of the district court (Pet. App. 34a-47a) is reported at 794 F. Supp. 412.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1994. The court of appeals denied petitioners' petition for rehearing on February 28, 1995. Pet. App. 58a. The petition for a writ of certiorari was filed on April 7, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In order to combat the production and distribution of child pornography, 18 U.S.C. 2257 (Supp. V 1993) requires all producers of matter containing visual depictions of "actual sexually explicit conduct" made after November 1, 1990, to create and maintain records of the names and dates of birth of the performers portrayed in the depictions. 18 U.S.C. 2257(a) and (b). The statute requires that the records be maintained at the producer's place of business or as elsewhere permitted by regulations, and that the records be made available "to the Attorney General for inspection at all reasonable times." 18 U.S.C. 2257(c). The statute also mandates that producers affix to each copy of material covered by its provisions a statement describing where the records required to be maintained regarding the depicted performers are located. 18 U.S.C. 2257(e)(1).

The statute's record-creation and maintenance requirements apply to those persons or entities most directly involved in the production of the most sexually explicit images. Thus, the statute defines "produces" to mean "produce, manufacture or publish," and includes "duplication, reproduction or reissuing," but does not include "mere distribution or any other activity which does not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted." 18 U.S.C. 2257(h)(3) (Supp. V 1993). In addition, the statute applies only to depictions of "actual sexually explicit conduct," which it defines as four specific types of actual (not simulated) sexual conduct: (1) "sexual intercourse," (2) "bestiality," (3) "masturbation," and (4) "sadistic or masochistic abuse." 18 U.S.C.

2257(h)(1) (Supp. V 1993) (incorporating the definitions contained in 18 U.S.C. 2256(2)(A)-(D)).[1]

The statute generally provides that no information or evidence obtained from the records shall be used "directly or indirectly" as evidence against any person with respect to any violation of law. 18 U.S.C. 2257(d)(1) (Supp. V 1993). The only exceptions are that the records may be relied upon as evidence in a prosecution for a violation of Section 2257 itself "or for a violation of any applicable provision of law with respect to the furnishing of false information." 18 U.S.C. 2257(d)(2) (Supp. V 1993). Violation of Section 2257 subjects a person to fines and imprisonment of up to two years for the first offense, and up to five years (and not less than two) for succeeding convictions. 18 U.S.C. 2257(i) (Supp. V 1993).

Under authority granted by the statute, see 18 U.S.C. 2257(e)(1) and (g) (Supp. V 1993), the Attorney General has promulgated regulations that further define its scope and operation. See 28 C.F.R. Pt. 75. Those regulations provide that only "primary producers"—that is, producers who actually film, videotape or photograph a covered visual depiction—

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[1] In modifying the definition of "producer" and of "actual sexually explicit conduct" in 1990, Congress inadvertently failed to repeal the prior definitions of those terms. See Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 311, 104 Stat. 4816 (striking "subsections (d) and (e)" of prior law, but not subsections (f) and (g)). However, Congress's intent to substitute the definitions contained in the 1990 Act is apparent. In any event, the definitions adopted in 1990 are controlling because they are later-enacted, and petitioners have not contended otherwise.

are obliged to examine a performer's original identification documents. Secondary producers, who do not personally create a covered visual depiction, may satisfy their recordkeeping obligations by accepting "copies of the [required] records" from the primary producer. 28 C.F.R. 75.2(b). The regulations also provide that persons whose activities are limited to distribution or photo-processing are not producers within the meaning of the statute. 28 C.F.R. 75.1(c)(4).

2. Petitioners, thirteen entities involved in the production or distribution of books, magazines, films, and photographs, filed suit in the United States District Court for the District of Columbia claiming that Section 2257 violates the First Amendment.[2]

a. The district court found it unnecessary to resolve petitioners' claim that Section 2257 regulates protected speech based on its content and hence is subject to strict scrutiny, because it found substantial provisions of Section 2257 infirm even under the standard of intermediate scrutiny applicable to time, place, and manner restrictions. Pet. App. 41a-43a. The court noted that it was "undisputed by either party that the government has a compelling interest

[2] Many of the same petitioners had sued to enjoin the enforcement of a predecessor statute, the Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4485-4503 (1988). See 18 U.S.C. 2257 (Supp. II 1990). The district court ruled that significant parts of Section 2257 violated the First Amendment. However, the district court's ruling was vacated as moot after Congress, in 1990, in response to the district court's decision, amended Section 2257 by enacting the Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4816-4817. See *American Library Ass'n* v. *Barr*, 956 F.2d 1178, 1182 (D.C. Cir. 1992).

in attempting to eradicate the evils associated with child pornography," *id.* at 40a, and that "the government has every right to regulate—or even ban—[sexually explicit visual] depictions of underaged persons." *Id.* at 43a. Thus, the court concluded, under any level of scrutiny, Section 2257 is "constitutional as applied to images of models under 18 years of age." Pet. App. 47a. Petitioners, however, alleged that they produce or distribute visual images containing depictions of actual sexually explicit conduct of adults. *Id.* at 40a n.4, 47a. And in the court's view, imposition of what it termed the "burdensome" record-keeping requirements of Section 2257 on such producers does not rationally advance the statute's goal of enabling the government to identify and combat child pornography. *Id.* at 43a-47a. The court therefore enjoined enforcement of Section 2257 "as it applies to records that must be kept pertaining to images of adult models." Pet. App. 47a.

b. The court of appeals in large measure reversed. Pet. App. 1a-33a. It held that Section 2257 and its implementing regulations are constitutional as applied to "the vast majority of the materials affected by them." *Id.* at 31a. The court, however, did conclude that "certain provisions and potential applications" of the statute are inconsistent with the First Amendment. *Ibid.*

The court held, first, that Section 2257 and the regulations promulgated thereunder are not content-based interferences with speech, and hence are subject to intermediate rather than strict scrutiny under the First Amendment. Pet. App. 8a-17a. The court acknowledged that "[d]eciding whether a particular regulation is content-based or neutral is not always a simple task," *id.* at 9a (quoting *Turner Broadcast-*

ing Systems, Inc. v. *FCC*, 114 S. Ct. 2445, 2459 (1994)), and that under this Court's precedents, the "controlling consideration" is the government's purpose. Pet. App. 9a-10a (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)); see also Pet. App. 10a ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." (quoting *Ward*, 491 U.S. at 791)). The court of appeals found it "clear that Congress enacted the Act not to regulate the content of sexually explicit materials, but to protect children by deterring the production and distribution of child pornography." Pet. App. 13a; see also *id.* at 11a (noting difficulty under prior child protection laws of ascertaining real ages of adolescent performers). As the court explained, "section 2257 applies to speech of a particular content not because of any concern over the thoughts it might convey, but because the evil the law was designed to address —the use of underage performers—has its locus in the speech's production." *Id.* at 15a. The court therefore concluded that Section 2257 and the regulations are valid if they satisfy the test of intermediate scrutiny—*i.e.*, if they are "narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels of communication." *Id.* at 17a (quoting *Ward*, 491 U.S. at 791).

Applying that test, the court of appeals first noted that the "Government has a significant—indeed compelling—interest in the prevention of child pornography." Pet. App. 17a (citing *New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982)). The court further observed that Section 2257 as implemented leaves open "ample avenues for the communication of sex-

ually explicit materials," because "the Act, by its terms, bans no form of expression." Pet. App. 17a. The only remaining issue was therefore whether Section 2257 is narrowly tailored to advance its goals. The court of appeals held that, with the exception of several particular provisions, it is. *Ibid.*

Section 2257 generally furthers the government's substantial interest in deterring the production and distribution of child pornography, the court of appeals explained. It observed that by requiring primary producers to create and maintain records of their performers' ages, and by requiring secondary producers to inspect those records, the statutory and regulatory scheme "advance[s] the abatement of child pornography in fundamental ways": (1) "[i]t ensures that primary producers actually confirm that a prospective performer is of age," (2) "it deters children from attempting to pass as adults," and (3) "most important, it creates the only mechanism by which secondary producers (who by definition have no contact with performers) can be required to verify the ages of the individuals pictured in the materials they will be producing." Pet. App. 18a-19a. The court rejected the claim that, because Section 2257 requires producers to create and maintain records relating not only to child performers but also to adults, it is overbroad. It explained: "the statutory scheme depends upon requiring producers to identify and maintain records of *every* performer who appears in their sexually explicit materials. The entire point of the Act is to prevent subjective determinations of age by implementing a uniform procedure that applies to all performers." *Id.* at 21a. The court acknowledged that certain applications of Section 2257 could exceed constitutional bounds, "an

illustrated sex manual for the elderly being an obvious example," but noted that the instant facial challenge did not present "the concrete facts that would enable [it] to test the limits of the Act." *Id.* at 21a-22a. Such limits, the court reasoned, "are best determined in case-by-case tests." *Id.* at 22a.

The court also rejected respondents' facial challenge to most of the specific requirements of Section 2257 and the regulations. Pet. App. 23a-30a. The court observed, first, that the statute's recordkeeping requirements "can hardly be considered onerous," since they are similar to those "routinely required to facilitate the enforcement of our immigration, labor, and tax laws." *Id.* at 23a.[3] The court also upheld the statute's requirement that producers disclose where the records required to be kept may be found. *Id.* at 27a. The court observed that "[r]equiring the creation of records is of little avail if they cannot be readily located," and it is therefore "entirely appropriate" to require the producer to affix a statement identifying the location of the records disclosing performers' names and ages. *Ibid.*

The court of appeals did, however, set aside a regulation of the Attorney General that the producer maintain the records for as long as the producer remains in business and "for five years thereafter." 28 C.F.R. 75.4. Pending a new regulation "more

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[3] In addition, the court noted, the Attorney General's regulations make clear that "secondary producers" (that is, producers that have no personal contact with the models whose images appear in the covered depictions) may satisfy their recordkeeping obligations by accepting and retaining copies of the required records from the primary producer, or from the immediately preceding secondary producer. Pet. App. 23a-24a.

rationally tailored to actual law enforcement needs," the court stated it would "accept a period of five years as reasonable." Pet. App. 24a-25a. The court also expanded the exemption from the covered class of producers for "photo processors," see 28 C.F.R. 75.1(c)(4)(i), to include "printers, film processors, and video duplicators whose roles are functionally indistinguishable from that of photo processors." Pet. App. 9a. Finally, the court left for another day the application of Section 2257 and the regulations to "appropriationist artists," who "create distinct works that incorporate photographs taken by others —typically, without permission." The court found it unclear whether such artists are primary producers under the regulations, and observed that, while treating them as secondary producers "would raise a serious First Amendment problem," that problem "cannot be resolved on the present record." *Id.* at 28a-29a.[4]

ARGUMENT

There is no need for this Court to review the decision below. This is the first case in which a constitutional challenge of any kind to Section 2257 has been made. Accordingly, the decision of the court of appeals, upholding Section 2257 against petitioners' facial challenge, does not conflict with any other court of appeals' decision. Moreover, as a result of

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[4] District Judge Reynolds (E.D. Wisc.), sitting by designation, dissented, terming the statute "overbroad, chilling, and a questionable deterrent to child pornography." Pet. App. 32a. Judge Reynolds' brief dissent noted that Section 2257 applies to constitutionally protected depictions (not just child pornography) and that it does not further the goal of prosecuting child pornography because the statute precludes use of the records in such a prosecution. *Id.* at 32a-33a.

an injunction entered by the district court during this litigation (which remains in force until issuance of the court of appeals' mandate), Section 2257 has not yet been applied: No person has ever been prosecuted for allegedly failing to create or maintain records of the ages of performers who have engaged in the actual sexually explicit conduct designated by the statute. While theoretical applications of Section 2257 in the future conceivably could raise constitutional concerns, as the court of appeals recognized, any determination of the contexts in which the statute cannot validly be applied is properly reserved for future case-specific challenges. As for the court of appeals' resolution of the facial challenge presented by petitioners, it was based on a straightforward—and correct—application of this Court's First Amendment precedents.

1. Petitioners argue (Pet. 14) that, despite the absence of any circuit conflict, review of the decision below is warranted because, petitioners assert, "[n]o other entity is likely to attempt a similar challenge." Petitioners do not make clear what the basis for that prediction is; on the contrary, other entities that are similarly of the view that the exercise of their First Amendment rights is being chilled by the existence of Section 2257 are at liberty to raise a facial challenge such as the one in this case, and they may do so in any district court in which venue properly lies. But even if no other facial challenge to the statute were likely, its constitutionality can plainly be raised as a defense to any future criminal prosecution for violating its record-keeping and disclosure provisions. Thus, there is no reason to believe that the decision below will "be the last word on the constitutionality of the Act." Pet. 14.

2. Petitioners also assert that review is warranted because the court of appeals misunderstood the First Amendment concept of "content-neutrality" and misapplied the standard of intermediate scrutiny. In fact, the court of appeals did no more than apply familiar principles and precedents of this Court in the context of Section 2257, and there is no reason to believe that the decision will have any effect outside the subject area covered by Section 2257.

a. Petitioners first contend (Pet. 14-19) that the court of appeals erred in not finding Section 2257 to be a content-based regulation of speech subject to strict scrutiny. In reaching that conclusion, however, the court of appeals followed this Court's teaching that legislative purpose is a key consideration in determining whether a given regulation is content-neutral. As this Court has explained, a regulation that serves "purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others," and thus a statute is content-neutral if it is "*justified* without reference to the content of the regulated speech." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis in original); accord *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (upholding as content-neutral a zoning ordinance that barred "adult" (but not mainstream) movie theatres from locating within 1,000 feet of any residence, church, park or school). In this case, as the court of appeals recognized, Section 2257 serves the purpose of deterring the exploitation of children in the production and distribution of material containing actual sexually explicit conduct, and any disproportionate effect on persons whose films contain depictions of such conduct is merely incidental to that conduct-based objective. See

also *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) (applying intermediate scrutiny to government regulation of conduct combining " 'speech' and 'nonspeech' elements").

Petitioners claim (Pet. 14-16) that under this Court's decision last Term in *Turner Broadcasting Systems, Inc.* v. *FCC*, 114 S. Ct. 2445 (1994), reliance on congressional purpose is inappropriate in determining whether or not a given law is content-neutral. Petitioners misread *Turner*. *Turner*, in fact, reaffirmed that the "principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." 114 S. Ct. at 2459 (brackets in original). Under that inquiry, as the court of appeals recognized, Section 2257 is plainly valid, for it reflects not disagreement with actual sexually explicit materials, but rather an attempt to identify and deter the illegal conduct of using child participants in such films.

It is true that the Court, in *Turner*, did observe that the "mere assertion of a content-neutral purpose" is insufficient "to save a law which, on its face, discriminates based on content." 114 S. Ct. at 2549. But here, the statute fully permits producers to create and disseminate material containing sexually explicit depictions—and to express any message using those depictions—so long as the producer has complied with the statute's record-keeping and disclosure requirements regarding performers who engage in such acts. See also Pet. App. 14a (while Section 2257 "may impose certain obligations on * * * speakers, [it] place[s] no restrictions on the speech itself"). This case is thus closely akin to *Renton*,

where the Court upheld, as content-neutral, a municipal ordinance imposing restrictions on the location of adult theaters, even though the ordinance defined adult theaters by reference to the content of the films the theaters exhibited. 475 U.S. at 44. The Court reasoned that the ordinance was justified not by any purpose to suppress ideas, but by the need to combat the "undesirable secondary effects"—in the form of crime and adverse impacts on retail trade and property values—associated with such theaters. Hence, the ordinance was to be "reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *Id.* at 49, 51; see also *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2546 (1992) ("A[] valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the . . . speech.'") (quoting *Renton*, 475 U.S. at 48); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion); *id.* at 82 n.6 (Powell, J., concurring)).

In this case, as the court of appeals recognized, Congress has taken aim at such a secondary effect: the exploitation of children in pornography. Without proper controls on the employment of minors, the production of visual depictions of sexual conduct risks the creation of child pornography, a category of expression that is "unprotected by the First Amendment." *New York* v. *Ferber*, 458 U.S. 747, 764 (1982). Congress was free to seek to reduce the physical and psychological exploitation of minors —a recognized and inherent effect of the production and distribution of child pornography, *id.* at 758-760

—by requiring that producers of sexually explicit visual depictions check the names and addresses of the models they plan to employ. And as the court of appeals noted (Pet. App. 19a), a statute that imposed record-keeping burdens only with respect to child performers would achieve that objective far less successfully, because it would be easier under such a regime for children to pass as adults and for adults to claim ignorance of a child's minority status.[5]

b. Petitioners also argue (Pet. 20-24) that the court of appeals misapplied the standard of intermediate scrutiny, on the grounds that Section 2257 does not advance the government's interest in deterring the production and distribution of child pornography. In particular, petitioners suggest (Pet. 20) that Section 2257 is incapable of deterring the use of children in pornography because it forbids the use, in criminal prosecutions, of the records that it requires to be created and maintained.

Petitioners' analysis is flawed, because the statute achieves its objective of deterring the use of children in pornography by means other than creating evidence that is admissible at trial. First, logic suggests

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[5] Petitioners also suggest (Pet. 17) that the court of appeals' determination that the statute is content-neutral conflicts with decisions of other courts of appeals that have found governmental attempts to regulate but not ban the access of minors to indecent telephone messages ("dial-a-porn") to be content-based. But those cases, which have generally upheld such regulations, see, *e.g.*, *Dial Information Servs. Corp.* v. *Thornburgh*, 938 F.2d 1535, 1540-1543 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992), have involved efforts to regulate speech as such, not to deter conduct having an incidental effect on expression, as in this case. See also Pet. App. 16a.

—and Congress was informed—that a producer confronted with documentary evidence that a model is underage will refuse to employ that model in a sexually explicit visual depiction. See *Child Protection and Obscenity Enforcement Act of 1988: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 450 (1988) (in a system in which producers were required to create and maintain records regarding performers' ages, "many of the marginal producers would probably say, well, let us just go ahead and deal with the 19-year old girl * * *, rather than dealing with the 17-year old girl"). Second, under Section 2257, child models who misguidedly desire to hold themselves out as adults will find it more difficult to do so, because they are now required to submit proof of age. Pet. App. 19a. Third, even if the primary producer (who creates the visual depiction) resolves to hire an underage performer, there can be little doubt that the record-keeping provisions eliminate the ability of secondary producers (who incorporate the depictions of others and have no direct contact with the performer) to claim that they made an "honest mistake" with regard to the age of a model depicted. *Ibid.* At the very least, therefore, "the record-keeping obligations imposed on primary producers remain elements of the statutory scheme that are critical to ensuring that secondary producers deny child pornographers access to their markets." *Id.* at 20a.[6]

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[6] Petitioners claim (Pet. 21) that deterrence of child pornography was not among Congress's purposes in passing Section 2257. On the contrary, however, achieving such deterrence was prominently mentioned as one of the goals of the statute. See, *e.g.*, 134 Cong. Rec. 25,913 (1988) (remarks of Sen. Heflin) (noting that by requiring verification of

Petitioners suggest (Pet. 21) that, to the extent that the statute's deterrent effect is said to be achieved by depriving persons charged with producing child pornography[7] of an "honest mistake" defense, that effect is nugatory because "ignorance of a performer's minority is not a defense to a charge of producing child pornography." See *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 471 n.5 (1994). But petitioners concede (Pet. 21), as they must, that courts have permitted persons prosecuted for producing child pornography to assert as a defense that, after diligent investigation of the performer's age, they believed the model to be an adult. See *United States* v. *United States District Court*, 858 F.2d 534, 540 (9th Cir. 1988). In such cases, therefore, Section 2257's record-keeping and disclosure scheme furthers the government's deterrence interests by giving specific content to the diligence required of a child pornography defendant in ascertaining the age of a prospective model.

Petitioners also assert that Section 2257 is overinclusive because its recordkeeping and disclosure provisions apply to "mainstream producers and dis-

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ages, the record-keeping requirements will "thereby significantly deter the illegal use of minors in such pornography"). See also *Child Protection and Obscenity Enforcement Act and Pornography Victims Protection Act of 1987: Hearing before the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 161 (1988) ("[t]he very fact that [child pornographers] must have a record that these young people are at least 18 years of age will be a tremendous deterrent to pornographers' seducing, recruiting young people into this illicit industry"); *id.* at 88 (testimony that the requirements "would cause those involved in the production of pornography to be cautious in avoiding the use of children").

[7] See 18 U.S.C. 2251(a).

tributors," who, petitioners assert, "do not deal in sexual images of minors." Pet. 23. But, as Congress determined and as the court of appeals emphasized, good intentions are insufficient to eradicate the problem of child pornography. As the court of appeals put the matter: "The entire point of the Act is to prevent subjective determinations of age by implementing a uniform procedure that applies to all performers." Pet. App. 21a. Petitioners' claim of overinclusiveness is also belied by the narrow range of highly explicit materials covered by Section 2257 —producers need create and maintain records relating only to those performers who engage in actual sexual intercourse, bestiality, masturbation, or sadistic or masochistic abuse. 18 U.S.C. 2257(h)(1). Thus, to a degree greater than under the broader definition at issue in *United States* v. *X-Citement Video, Inc.*, *supra*, "[w]hat is involved * * * is not the clinical, the artistic, nor even the risque, but hard-core pornography." 115 S. Ct. at 475 (Scalia, J., dissenting).

Finally, the method chosen by Congress to deter child pornography—requiring producers to note the names and ages of their performers, as well as to disclose where the required records may be found—imposes burdens on producers that are no greater than those arising from the immigration, tax, and child labor laws,[8] or than are necessary as a matter of prudent business practice to ensure proper re-

[8] See, *e.g.*, 8 U.S.C. 1324a(b); 8 C.F.R. 274a.2 (Immigration Reform and Control Act); 29 U.S.C. 657, 673; 29 C.F.R. 1904.2(a), 1904.5 (Occupational Safety and Health Act); 29 U.S.C. 211; 29 C.F.R. 516.2 (Fair Labor Standards Act); 26 C.F.R. 31.6001-2, 26 C.F.R. 31.6001-5 (federal social security and income tax regulatons).

leases and transfer of copyright. Indeed, such requirements have long been considered an acceptable means of governmental regulation, even where expression at the core of the First Amendment is affected. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 60-74 (1976) (per curiam) (upholding reporting and disclosure requirements of the Federal Election Campaign Act). In this case, the burdens imposed by Section 2257 are no more than those necessary to serve the government's compelling interests in deterring the production and distribution of child pornography.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE AMERICAN LIBRARY ASSOCIATION, *et al.*,
Petitioners,

v.

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Solicitor General's response to the petition fails to address the arguments made by petitioners. Instead, the government tries to minimize the burdensome impact of the Act and obscure the serious flaws of the D.C. Circuit's First Amendment analysis. The response demonstrates the vital need for this Court's guidance in this important area of constitutional law.

• The government does not dispute—nor could it—that the Act literally bans and criminalizes the sale and distribution of constitutionally protected speech. It does not dispute, for example, that the Act *bans* distribution of non-obscene images of adults if the producer has not attached the requisite disclosure label. Even though the distributor has no record-keeping or labeling obligations, the distributor is nevertheless forbidden to distribute constitutionally protected expression if the *producer* has not complied with the Act's record-keeping and labeling requirements. Compliance with the Act is completely out of the distributor's control. Yet it is a felony for the distributor to exercise his or her constitutional right to distribute non-obscene images of adults. The government simply ignores the Act's application to distributors.

Respondents misleadingly assert instead that "[t]he statute's record-creation and maintenance requirements apply to those persons or entities most directly involved in the production of the most sexually explicit images." Op. Cert. at 2. To the contrary, only the so-called "primary producer" is directly involved in production. All other statutory producers, by definition, are *not* involved in the creation of the images. The Act's requirements apply equally to the magazine publisher to whom an image is submitted for publication, to anyone who duplicates the image in any fashion, to anyone who includes the images in an advertisement, and to anyone who edits a film or video. In addition, the Act applies to anyone who distributes the image. All are subject to criminal penalties for

exercising their First Amendment rights, even though none of them had anything to do with the creation of the image.

• The government argues that the Act applies to only a "narrow range of highly explicit materials." Op. Cert. at 17. The mainstream petitioners here, all of whom submitted unrebutted affidavits discussing the materials that would be affected by the Act, belie the government's view.

In any event, as the government has conceded throughout this litigation, virtually all the images subject to the Act are images of *adults*. And, although they may be "sexually explicit," those images are nonetheless entitled to full protection under the First Amendment. Indeed, the District Court found, based on the record evidence, that some of the material created by petitioners and others subject to the Act is highly political and entitled to "the highest degree of protection." Pet. App. 42a n.5.

This Act will impact cable programmers and operators, libraries, mainstream magazine publishers and their distributors, and films attended daily by hundreds of thousands of Americans. The government cannot marginalize the law's effect.

• Respondents argue that the Court should not grant certiorari because there is no conflict. Of course there is not. Because of the Act's serious impact on their speech rights, petitioners have been challenging the law since the passage of its predecessor, and there has been an injunction in place preventing the Act's enforcement. Where, as here, a federal statute applies to myriad speakers and directly implicates their First Amendment rights, the Court frequently grants review, especally where the case involves a facial challenge brought by such a broad-based coalition—and especially where the Court of Appeals committed such gross errors of First Amendment law.

This statutory scheme has twice been declared unconstitutional; the D.C. Circuit substantially upheld the current version of the Act only over a dissent. And there were strong dissents from the Court of Appeal's denial of the

petition for rehearing *en banc*. Despite respondents' disingenuous attempts to minimize the importance and impact of the case, it plainly merits review by this Court.

• Respondents argue that the Act can be challenged later, in defense to a criminal prosecution. This argument completely misses the point of petitioners' facial challenge. These mainstream organizations and entities have brought this lawsuit because, as they have testified in uncontroverted sworn statements, *they will cease producing or distributing images that are covered by the Act in order to avoid its severe and senseless burdens.* If the Act is not struck down, as a result of *this* challenge, a significant amount of constitutionally protected material will simply disappear. Judge Tatel's prediction will come true: "the greatest effect of this statute may thus well be to restrict . . . the flow of protected speech into the hands of galleries, stores, libraries, artists, and every adult who desires to see and hear it." Pet. App. 55a. It is no answer to say "wait for a prosecution." In the meantime, the Act will have needlessly chilled a substantial amount of constitutionally protected speech.

• Most remarkably, the government claims that the D.C. Circuit's content-neutrality analysis is a straightforward application of this Court's precedents and will not have any effect outside this case. Op. Cert. at 11. The government argues that a law that, *by its terms,* applies *directly* and *only* to speech of specified content, and where the law's substantial burdens can be avoided by speakers' self-censorship, is "content neutral." For the D.C. Circuit to so hold, and for the Solicitor General to so argue, itself demonstrates that there is fundamental confusion regarding the proper test for deciding whether a law is content-neutral. For this reason alone, the Court should grant review.

• The government attempts to compare this statute to the one at issue in *Ward v. Rock Against Racism,* 491 U.S. 781 (1989), which the Court noted had an "incidental effect on some speakers or messages but not others." *Id.*

at 791. But there is no "incidental" effect here. The statute *by its very terms* applies *only* to certain speakers with defined messages—only those who produce and distribute expressive material of specified content. It applies to no others. The effect could not be more direct.

The regulation at issue in *Ward* had nothing to do with the content of the music publicly performed. It regulated the sound-amplification of *all* music. There is no comparison to the Act's critical dependence on the content of the images produced and distributed.

In further contrast to *Ward*, this Act is *justified only* by reference to the content of the regulated speech. Congress sought to deter "child pornography"—sexual images of minors. The Act refers directly to the substantive child pornography statute for its definition of the content of the speech covered. 18 U.S.C. § 2257(h)(1). The justification has a direct and inextricable tie to the content of the regulated speech.

• Contrary to the government's argument, the Act does not regulate *conduct* (as opposed to speech). The Act's requirements apply *only* to expressive activity—the production and distribution of visual images. It does not even pretend to regulate the underlying activity—the posing of models and performers. Respondents repeatedly intone the phrase the "exploitation of children." Petitioners are as strongly opposed to such exploitation as are respondents, and they do everything in their power to prevent it. But the only "exploitation" the statute purports to address is expressive activity—production and distribution of visual images. The government cannot make this a non-speech activity by giving it a different name.

There is no comparison to *United States v. O'Brien*, 391 U.S. 367 (1968). The prohibition of draft-card burning in *O'Brien* "on its face deal[t] with conduct having no connection with speech." *Id.* at 375. There was "nothing necessarily expressive" about draft-card burning, and the *O'Brien* statute did not "punish only destruction engaged in for the purpose of expressing views." *Id.* The operation

of the statute was "limited to the noncommunicative aspect of O'Brien's conduct." *Id.* at 381. Here, in sharp contrast, the operation of the Act is *not* limited to the noncommunicative aspects of the conduct of producers and distributors. The regulation directly targets the *communication* of images, and punishes producers and distributors for their expressive activity. For these reasons, the Act cannot be subject to the *O'Brien* standard. The D.C. Circuit's and Solicitor General's contrary conclusion demonstrates real confusion regarding this Court's controlling First Amendment precedents.

• The Solicitor General's discussion of this Court's recent decision in *Turner Broadcasting Systems, Inc. v. FCC*, 114 S.Ct. 2445 (1994), also reflected in the D.C. Circuit's decision, demonstrates a fundamental misunderstanding of that important decision, as well.

Petitioners do not contend—as respondents would have it—that the government's purported purpose is irrelevant to the content-neutrality analysis. Op. Cert. at 12. Rather, petitioners pointed out that this Court, in *Turner*—following a long line of First Amendment cases [1]—reiterated that a seemingly content-neutral purpose is not enough to avoid strict scrutiny. This Court could not have stated it more plainly: a "mere assertion of a content-neutral purpose" is insufficient "to save a law which, on its face, *discriminates* based on content." 114 S.Ct. at 2459 (emphasis added).

The Solicitor General simply rewrites the *Turner* Court's holding. The government claims that what this Court really meant in *Turner* was that a content-neutral purpose is insufficient to save a law which on its face *bans* speech based on content. *See* Opp. Cert. at 13 (arguing

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[1] *See, e.g., Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 480 U.S. 575 (1983) (tax on paper and ink that applied to certain newspapers is subject to strict scrutiny); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (same regarding tax scheme applied only to magazines of specified content).

there is no problem under *Turner* because the Act permits producers and distributors of sexually oriented material to exercise their speech rights so long as they comply with the law). *Turner*, however, does not distinguish between a burden and a ban on speech. Indeed, the case itself involved a *burden* on speech, not a ban.[2] The ban-burden distinction the government (and the D.C. Circuit) seek to draw is flatly inconsistent with this Court's jurisprudence (*see* the numerous cases cited in Pet. at 17). The question, for purposes of determining content-neutrality, is whether the statute makes a distinction—"discriminates"—on the basis of content. The D.C. Circuit's complete rejection of this inquiry cannot be squared with this Court's precedents and must be reversed.

• The government's analogy to *Renton v. City of St. Paul*, 475 U.S. 41 (1986), displays a similar serious misconstruction of this important area of First Amendment law. *Renton* involved the government's attempt to regulate the "secondary effects" of adult movie theaters. This case involves neither "effects" nor anything "secondary." The exploitation of children through their use in child pornography is not an *effect* of the production and distribution of such sexually explicit visual images. If anything, it is a necessary *precedent* to production; the production could not happen without it. It is, in fact, part and parcel of that production. For that reason, the Act *directly* targets and burdens the expressive activity—the production of visual images. The correct analogy would be if the law at issue in *Renton* had been intended to deter the *production* of the adult movies shown in the theaters; but it was not. It was concerned, instead, with the *non*-expressive "secondary effects" that were thought to be associated with adult theaters—loitering, prostitu-

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[2] *See also, Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990); *Riley v. National Fed. of the Blind*, 487 U.S. 781, 795 (1988); *Talley v. California*, 362 U.S. 60 (1960), all of which applied strict scrutiny to disclosure and recordkeeping laws that burdened but did not ban speech.

tion, etc.—and could therefore be deemed "content-neutral" in purpose.

• The government's reliance on *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), is most ironic. *See* Op. Cert. at 18. There, the Court reviewed analogous record-keeping and disclosure requirements under *strict scrutiny*. *Accord FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990); *Riley v. National Fed. of the Blind*, 487 U.S. 781, 798 (1988); *id.* at 803 (Scalia, J., dissenting). Far from supporting the D.C. Circuit's analysis, *Buckley* demonstrates just how divergent from this Court's precedents the Court of Appeal's First Amendment analysis was.

• Respondents' attempt to distinguish this case from cases in which other Circuit Courts have held similar laws to be content-based and therefore subject to strict scrutiny is specious. *See* Op. Cert. at 14 n.5. Contrary to the government's assertion, those cases involved statutes (restricting access to "dial-a-porn" telephone messages) that were just as much concerned with regulating *speech* as is the Act at issue here. *See* Petn. at 17.

• Respondents admit, as they must, that the record-keeping and labeling requirements of the Act cannot serve Congress' *stated* purpose of making the prosecution of child pornography easier. The records will not help prosecutors determine the age of those depicted; nor will they undermine any child pornographer's defense of ignorance of age. The reason is simple: the Act prohibits the use of the records *or any evidence gleaned from them* in any child pornography prosecution.

As a result, the government is forced to come up with some other purpose the burdensome Act purportedly serves. Our point—to which respondents utterly fail to respond—is that there is no evidence to support the government's newly found purpose or the assertion that the Act furthers that purpose. The government has simply made it up.

It does not matter whether the government's prediction that a producer forced to look at identification documents would not use a minor is true. The government has never been able to demonstrate that there are producers that are currently deceiving themselves about models' ages who would be deterred by the Act. The government deals entirely in hypotheticals and speculation.

Indeed, the evidence demonstrates that there is no such body of individuals. The government's own report found that child pornography is distinct from commercial production and distribution, and exists primarily "underground." 1 Att'y General Comm'n on Pornography Final Report 405-10 (1986). *Accord Osborne v. Ohio*, 495 U.S. 103, 110 (1990). In fact, the only example the government has ever come up with is Tracy Lords, who affirmatively deceived commercial producers into believing she was not a minor by using fake identification. *See United States v. United States D. Ct.*, 858 F.2d 534, 540 (9th Cir. 1988). The identification she used, though forged, would have been sufficient to meet the requirements of the Act. Accordingly, the Act would *not* have alerted producers to her minority.

The Solicitor General makes no attempt to square his speculations, hypotheticals and predictions with this Court's mandate that the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *United States v. National Treasury Employees Union*, 115 S.Ct. 1003, 1017 (1995) (quoting *Turner*, 114 S.Ct. at 2450). Indeed, the government simply ignores the Court's holding in *NTEU*. Such blatant refusal to follow this Court's precedents should not be tolerated.

This Court has been very clear. The government cannot impose burdens on First Amendment speakers without demonstrating that there is a need for those burdens and that the burdens will help solve the demonstrated

problem. In the name of stemming child pornography—a concededly important goal—the D.C. Circuit and the Solicitor General simply ignore this Court's constitutional directives. First Amendment standards do not change in this context. And this Court must make that clear.

• The government does not even address petitioners' argument that the Act burdens and deters *substantially* more speech—*i.e. all* speech involving images of *adults*, which will constitute virtually *every* image for which the burdensome records will be compiled and maintained—than is reasonably necessary to deter child pornography. *See Ward*, 491 U.S. at 799. To begin, the government does not even pretend that the Act will deter *real* child pornographers—those who purposefully use minors; according to the government, the Act is aimed only at those who are negligent or reckless in their use of minors. If Congress really was concerned that producers were deceiving themselves about the age of the performers they use, it could easily have passed a statute expressly providing that ignorance of age is no defense to a child pornography prosecution. Or, as Judge Tatel suggested, why not "impose criminal liability upon those who recklessly or negligently violate [the child pornography laws]"? Pet. App. at 54a. Such laws would *directly* deter child pornography without the overwhelming burden on protected speech imposed by the Act.

The Solicitor General's response seems to be that Congress thought the Act's approach, applying its record-keeping burdens almost entirely to the production and distribution of *adult* images, was appropriate. The fact that the Solicitor General can even argue that such a law burdens no more speech than is reasonably necessary illustrates confusion regarding the meaning of *O'Brien*'s tailoring requirement, and warrants review.

• The government contends—without support or explanation—that the substantial burdens imposed by the Act are "no greater" than those arising from existing laws of general application. The government is wrong. As we have previously explained, and the government has made

no attempt to dispute, no law imposes similar requirements. Petn at 13. Moreover, *none* of the laws respondents cite is aimed at First Amendment activity; none applies only to First Amendment speakers; none treats speakers differently than every other type of entity. Record-keeping laws that impose no burden on speech obviously do not implicate the First Amendment. Plainly, the existence of such laws does not justify, under First Amendment analysis, laws that *do* burden speech.

* * *

The D.C. Circuit's content-neutrality analysis is unprecedented and directly conflicts with this Court's First Amendment jurisprudence, articulated as recently as this Term. The Court of Appeals held, and the Solicitor General argues, that a law that applies directly and solely to speakers who engage in speech of specified content is nonetheless content-neutral. Even though the speaker could change the content of his speech and thereby avoid the burdens imposed by the Act—a factor the *Turner* Court described as epitomizing a content-based law—the D.C. Circuit held the Act is *not* content-based and therefore is not subject to strict scrutiny.

Whether a statute is content-based or content-neutral is a critical and often difficult question. *See Turner*, 114 S.Ct. at 2459. The decision below, and the arguments of the Solicitor General, vividly illustrate the need for further clarification, by this Court, of the test for deciding whether a law is content-neutral. This case would be an excellent vehicle for such clarification.[3]

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be granted.

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[3] This Court need not decide whether the Act *violates* the First Amendment. That decision could be made by the Court of Appeals on remand.

Respectfully submitted,

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